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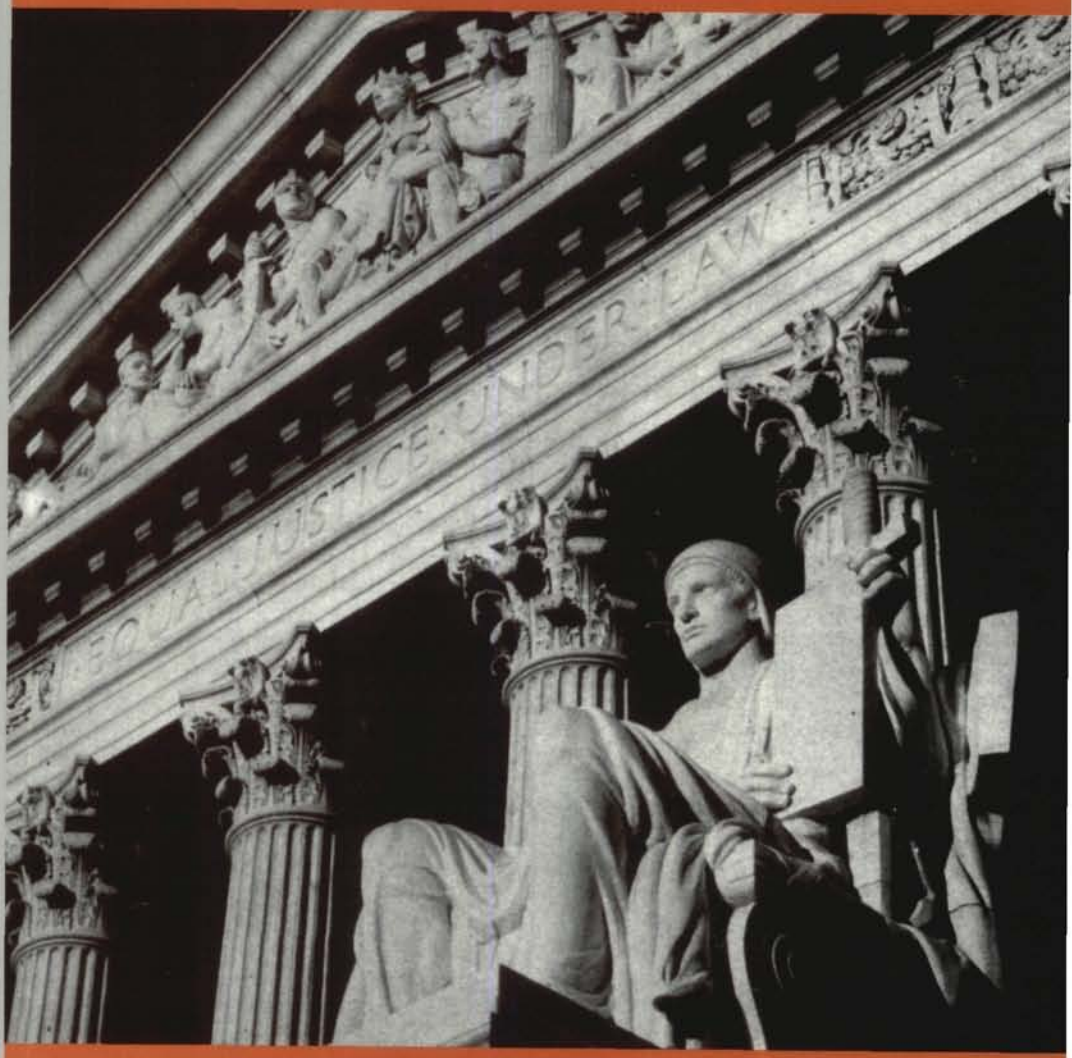
A Journal of Political Economy



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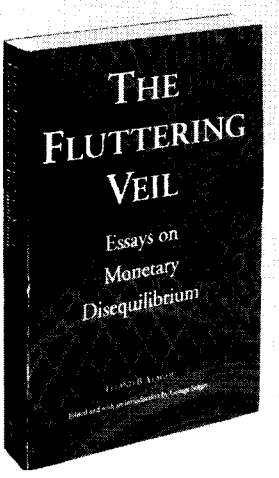
Essays on Economics and Liberty

The Fluttering Veil
Essays on Monetary Disequilibrium

By Leland B. Yeager
Introduction by George Selgin



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Constitutional Rules, Political Accidents, and the Course of History

New Light on the Annexation of Texas

JENNIFER ROBACK MORSE

Personalities of such dramatic dimensions so dominated the struggle over the annexation of Texas that one can hardly imagine the events without these particular characters. The proponents, John Tyler and John C. Calhoun, worked furiously toward the immediate annexation of Texas, for what they regarded as the good of their country, their party, their constituents, and their own political careers. Their political opponents, Thomas Hart Benton and Martin Van Buren, resisted forcefully, not only over Texas with all its implications and symbolism, but also for control of the Democratic party. From the very beginning of the American debate over Texas, the opponents of slavery contributed passion and color to the drama: Benjamin Lundy with his fiery pamphlet, John Quincy Adams with his heroic filibuster, and ultimately David Wilmot with his proviso to divide the territory acquired through the war that the annexation provoked.

And yet, as colorful and influential as these larger-than-life characters were, it was not so much the individual actors as the Constitution that determined the outcome of this great drama of American history. For the Constitution, by stipulating permissible actions, defines how Americans

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make collective decisions. More important with regard to the annexation of Texas, the Constitution actively encourages certain types of strategies. Even if we grant the premise of Manifest Destiny—that the territory of Texas was destined to become part of the United States—we still need to consider when, how, by whom, and under what terms this absorption was accomplished. Reflecting upon the governing structure established by the Constitution can help us answer these questions. We can even show how constitutional rules called certain types of people onto the political stage.

Of course, many modern students of the political process appreciate that institutions matter. Rational-choice theories of politics—law and economics, public choice, and the new institutional economics—deal with exactly this point. But because so much of this work is abstract, it is especially valuable to demonstrate the critical influence of constitutional rules on issues of decisive importance in determining the course of American history.

Without doubt, the annexation of the Republic of Texas by the United States was a critical event in North American history. In the view of many historians, the annexation of Texas marked the point at which the Civil War became unavoidable. The annexation itself provoked partisan polarization, sectional acrimony, and political upheaval serious enough to prompt a realignment of the political parties. The Mexican War followed quite directly from the annexation. The Compromise of 1850 arose from the attempts to allocate between free and slave states the territory acquired from both the annexation of Texas and the Mexican War. This compromise was so fragile that very small events could easily disrupt it, and in the following decade many large and dramatic changes occurred.

Institutions matter directly, as when the policy a group chooses changes with changes in the voting rules, but institutions may also matter indirectly. Politicians, in both the legislative and the executive branches, may react to the incentives and constraints created by institutions. In particular, the constitutional rules may shape the choice of issues on which to campaign. The decision-making rules in the U.S. Constitution shaped many of the details of the annexation of Texas in this way. The Constitution allowed particular strategies for winning elections and achieving policy outcomes. And these strategies, in turn, invited politicians to frame the issues surrounding the annexation of Texas in distinctive ways. So profound was the influence of the Constitution on the selection of issues that we may make the following bold statement: if the constitutional rules had been different, the outcome would have differed in predictable ways.

In the first section of this article, I lay out the variety and complexity of the issues presented by the annexation of Texas. Politicians had substantial latitude in their choice of issues to emphasize or ignore. The rich menu of

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choices invited politicians to frame the debate over Texas for particular kinds of political advantage.

In the second section, I defend the claim that Texas, which was barely annexed by a simple majority rule, could have been annexed under a supermajority procedure.[1] Moreover, the process would have gone more smoothly and with less acrimony if some supermajority procedure had been used. On the face of it, this claim appears to be false—after all, if 66 percent of the voters prefer A to B, then trivially, 51 percent do also.

The resolution of this apparent paradox lies in recognizing that the decision to annex Texas was not a simple yes-or-no choice. The voting rule determines the size of the winning coalition. Under simple majority rules, the winning 51 percent of the voters could be put together from many different possible constituencies, supporting the annexation for many different possible reasons. Most of the time, politicians cannot find issues that will attract new voters without repelling old voters. But repelling one set of voters while gaining another set of voters may be a cost-effective strategy in some circumstances. For instance, one set of voters might be more committed to a particular party or candidate for president. Some politicians might have found it advantageous to annex Texas on terms that appealed strongly to a particular set of voters, willingly sacrificing the support of other voters. With simple majority rules, politicians can quite readily find more issues around which to split up and reconfigure coalitions.

On the other hand, with a supermajority rule such as a two-thirds rule, politicians must convince a larger number of people to support them. Politicians will have little if any incentive to raise divisive side issues or to frame the major issue in a divisive way. Under supermajority rules, a politician who alienates coalition partners cannot achieve his main objective.

Americans could negotiate with each other, and with the Texans, along many different margins over the transfer of Texas to the United States. Under a supermajority rule, no politician who ultimately wanted the annexation to occur would have raised some of these issues. On the other hand, under a simple majority rule, there were plenty of possible sets of terms under which the annexation could take place.

To state the proposition more strongly: under simple majority rule, no set of terms for the annexation could dominate every other set of terms in pairwise competition; that is, no "Condorcet winner" existed over this domain of issues.[2] Therefore, the vote-cycling deadlock would have to be

1. A supermajority procedure is any voting rule that requires a vote of a larger than majority in order to pass. For instance, ratification of a treaty requires two-thirds affirmative vote of the Senate (U.S. Constitution, art. 2, sec. 2), and amendments to the Constitution must be ratified by three-fourths of the states (U.S. Constitution, art. 5).

2. A Condorcet winner is defined as a voting alternative that can beat every other alternative in pairwise competition.

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broken by the decision-making rules.[3] A supermajority requirement for the addition of new territory or new states would have eliminated a significant set of possible terms of annexation from the political bargaining table.

In the third section, I discuss the four Constitutional rules that were relevant to the annexation. First, the Constitution assigns to the president the power to set the agenda for treaties with foreign powers. Second, the Constitution requires the Senate to ratify treaties by a margin of two-thirds. Third, the Constitution allows new states to be admitted to the Union by a simple majority. And finally, the House of Representatives resolves presidential elections in which no candidate wins by a majority. I show how these rules determined the broad outlines of the timing and terms of the annexation.

In the conclusion, I show that President John Tyler used annexation as a political issue, to extract the greatest advantage possible for himself and his constituents. As president, he had the power to set the foreign policy agenda. As a potential third candidate in the presidential election of 1844, he had an incentive to divide the polity in order to throw the election into the House. And because the Constitution allowed the admission of new states by simple majority, he could frame the Texas issue to improve his prospects as a third-party candidate as well as to achieve the greatest benefit for his Southern constituents.

Foreign Policy Issues in the Annexation of Texas

The Republic of Texas came into existence in 1836, after separating itself from the Mexican Republic. Several questions immediately arose. Could Texas maintain itself as an independent country? If so, with which other countries would it be most likely to ally? If Texas could not remain independent, which other country might ultimately absorb it?[4]

Part of the value of Texas to all the possible contenders arose because of the vast expanse of Mexican territory west and north of Texas. Mexico's ability to hold and govern this territory was extremely limited, even before the Texas revolt. Mexico simply did not have the wealth to reconquer the heart of Texas or to maintain effective control over its other northern provinces. Therefore, the owner of Texas might ultimately possess present-day California, Utah, Nevada, New Mexico, and Arizona as well. For both Mexico and the United States, Texas had intrinsic and strategic value.

Although it quickly became obvious that Mexico could not reconquer

3. In the terminology of rational-choice voting theory, there was no preference-induced equilibrium; there could be only a structure-induced equilibrium.

4. For general histories of the annexation of Texas, see Pletcher (1973), Merk (1972), and Smith (1911).

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the heart of its former province of Texas, the Texas revolutionaries and the Mexican government continued to dispute a large area, over which neither could exercise decisive and final military control. In these circumstances a truly independent Texas would probably consist of roughly the old Mexican province of Texas rather than the entire area in dispute. So, an independent Texas would be a truncated Texas (see map). In that event, Texas would lie between its powerful American neighbor and an unstable Mexican neighbor. Although many Texans cherished hopes of independence, the likelihood that independence would last very long seemed small to most contemporaries.

An independent Texan republic might survive, however, by allying itself with Great Britain. The British were interested in Texas for several reasons. First, Britain had commercial interests in the Caribbean and wanted access to ports in the Gulf of Mexico. Second, Britain hoped to develop a source of cotton supply independent of the United States. Texas had the potential to become a huge cotton supplier, and Britain hoped that an independent Texas would trade cotton for manufactures on terms more favorable than the U.S. ones. Much of the U.S. market lay behind tariff barriers imposed at the behest of manufacturers in the Northeastern and Midwestern states. An independent Texas would not have such constituencies for protectionism. Hence, Britain could reasonably expect an independent Texas to be a better trading partner.[5] Finally, and perhaps most important, Britain wanted to check the expansion of the United States. A viable independent nation on the southwest frontier would serve that objective of British foreign policy at lower cost than most other strategies. For all these reasons, Britain threw its weight behind Texan independence.

The British exerted diplomatic pressure to keep Texas and Mexico at peace, and Texas independent. They offered to mediate between Texas and Mexico. They also offered to guarantee the boundary between Texas and Mexico if Mexico would accept a settlement that gave it only nominal sovereignty over Texas. The British made preliminary efforts to persuade the Texans to abolish slavery. Furthermore, they offered Texas a free-trade treaty with the British Empire, and they tried to involve France in a common cause against the annexation. Finally, when all else failed, they tried to bully the

5. Ephraim Douglass Adams (1910, 138–44, 150). The U.S. minister to Britain, Edward Everett, claimed that Britain's interest in Texas was not an abolitionist interest, but rather a purely commercial interest. This report was not particularly reassuring to Southerners, as an attack on their commercial interests was exactly what they feared. They believed that abolitionism was an indirect means to their commericial ruin, so that Britain could dominate the world cotton trade. See the discussion among John C. Calhoun and his correspondents, during the years 1842 and 1843, in *The Papers of John C. Calhoun* (1959–1996) throughout volumes 16 and 17.

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Area in Dispute between Texas and Mexico

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Mexicans into recognizing Texas independence. When all their diplomatic efforts failed, they withdrew and acquiesced in the annexation.[6] Although the British wanted an independent Texas, they were not willing to go to war to prevent a merger between two countries that wanted unification.[7]

The Texan Congress voted to petition for annexation to the United States almost immediately after declaring independence. This action suggests that the Texans regarded their territory as having more value if attached to the United States. As part of the United States, Texas would belong to the free-trade league and mutual defense pact that characterized the government of nineteenth-century America. Texas would have full access to the U.S. market. Slaves could be moved back and forth across the Texas border without violating the prohibitions on the international slave trade. And, most significantly, Texas could call upon the military might of the entire United States for its defense against potential enemies, the most immediate of whom was Mexico.

So the contemporary claim that the annexation of Texas was "inevitable" rings true. But this gives us no guidance in answering other important questions, because it tells us nothing about the distribution of the gains from the exchange, either between the countries or within the polity of each country. Even if the United States could outbid all other competitors for Texas, the "price" could be paid along multiple dimensions, because the countries might negotiate along many margins.[8] Of course, the claim that Texas would "ultimately" go to the highest bidder tells us nothing about the timing of the annexation, and accounting for the timing of events is a significant part of the historian's job.

The Texan Congress voted almost unanimously to petition for annexation to the United States, which suggests that the interests of Texans were reasonably uniform with regard to the annexation question. The same cannot be said of the United States. Thus far this analysis has treated the United States as if its government were a single all-powerful individual, able to make any trade it chooses. But the government of a democratic country

6. See Adams (1910). For British offer of mediation, see pp. 128–36; for offer of boundary guarantee, see pp. 146–50; for efforts to abolish slavery, see pp. 138–44; for common cause with French, see pp. 158–60; for ultimate acquiesence, see pp. 171, 188.

7. Adams (1910) quotes a highly placed British official to this effect: "Undoubtedly, we will both use our best efforts for that purpose, and will even refuse to recognize the annexation of Texas to the United States; but as a Question of Peace or War, I am not prepared to say that its junction with the American States is of sufficient importance to us to justify our having recourse to arms in order to prevent it" (191).

8. Sam Houston played coy with the United States on several occasions. It is evident from his behavior that he was attempting to extract concessions from the United States by holding out on annexation. See Adams (1910, 156, 161, 201).

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consists of numerous individuals with conflicting and competing goals. Even if the annexation of Texas were "inevitable" in some ultimate geopolitical sense, the interests of specific Americans were so many and varied that it is difficult to define a single "U.S. interest."

The Condorcet Problem and the Texas Question in American Politics

I shall now defend the following proposition: Texas, which was barely annexed by a simple majority rule, could have been annexed under a supermajority procedure. Moreover, the process would have been smoother and less acrimonious if some supermajority procedure had been used.

One supermajority procedure came close to being used. Texas could have been annexed by a treaty, which would have required the assent of two-thirds of the Senate. The United States had used the treaty procedure to make its two previous territorial acquisitions, the Louisiana Purchase and the acquisition of Florida. The first attempt to acquire Texas involved the treaty process. In January 1844, Texas diplomats reported to their superiors that two-thirds of the Senate was likely to ratify a treaty. Yet in June 1844 the treaty failed to gain the support of even a simple majority. What happened in those six months to create such a change?

The answer lies in understanding that "annexing Texas" is not a simple, well-defined proposition. Texas could be annexed on a variety of terms, with differing consequences for the benefits of various American interest groups. Thus, it is crucial to understand the different ways in which the issue could be framed. Let us examine these in turn.

Foreign Policy Issues

An independent Texas would have the need and the ability to pursue its own foreign relations. The most ominous possibility from the American point of view was that Texas might become, in the words of one of its diplomats, "in some form or other a dependency of Great Britain."[9] Certainly, Americans differed among themselves, both in their projection of the likelihood of such dependency and about the consequences of Texan dependency on Britain, should it occur.

The rankings of preferences among the American political parties on this issue would feature the Southern Democrats as the most hostile to British designs in Texas, followed by the Northern Democrats, the Southern Whigs, and finally the Northern Whigs. With these preference orderings and

9. Isaac Van Zandt to Anson Jones, 20 January 1844, in Garrison (1911, 2:240–42).

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with no other major issues on the table, Texas could be annexed. Moreover, Texas could be annexed by a treaty—that is, it could obtain the support of two-thirds of the Senate—because only the Northern Whigs would be likely to hold out against the annexation if the issue were framed in this way. The Texan diplomats reported:

> The impressions, which exist here in regard to the State of Affairs, have induced the opinion that Texas must either be annexed to this Union, or become in some form or other a dependency of Great Britain. This view of the case has had an important influence upon many of the Senators of the non-slaveholding states. Were the question deprived of this feature I should dispair [sic] of its success. It is believed that any undue influence, obtained by Great Britain whether in a commercial or other point of view, in Texas, must sooner or later prove dangerous to the institutions and prosperity of this country and therefore ought to be resisted.... This subject I believe is well understood and fully comprehended by both northern and southern men.[10]

A favorable informal vote count taken in January 1844 occurred in a context in which both Northerners and Southerners considered the British threat credible and serious.

Domestic Issues

Expansion of slavery into the territory acquired from Texas was the issue that came to dominate the political stage. This, in turn, was linked to two other issues: the party positions on Manifest Destiny (not called that at the time) and the sectional positions on representation in the Senate. The constituents of the Democratic party favored cheap land policies and territorial expansion, whereas the Whig party favored slow-growth policies and the compact development of the eastern seaboard.

The admission of new states complicated these relatively simple positions and aggravated every existing sectional issue. Politicians in both the North and the South calculated the likely effect of any new state on the voting strength of their particular block. The issue of the expansion of slavery into newly acquired territory was explosive precisely because it affected the likely political sympathies of the new states more than any other constitutionally acceptable rule. A rule explicitly prohibiting Southerners or Democrats from migrating into the territories would surely have been unconstitutional. In fact, however, the people most likely to migrate into

10. Isaac Van Zandt to Anson Jones, 20 January 1844, in Garrison (1911, 2:240–42).

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territory suitable for plantation agriculture were Southern Democrats. So the attempt to prohibit slavery in newly acquired territory had the effect of governing the sympathies of future voters who would be sending senators to participate in partisan politics.

In practice, the most important sectional issues included the whole complement of issues surrounding slavery itself (fugitive slave provisions, slavery in the District of Columbia, the gag rule, and the like) as well as commercial issues such as free trade and federally funded internal improvements.

In general, the partisan/sectional positions were as follows: Democrats wanted large territorial expansions, whereas Whigs wanted the country to grow in a compact and modest way, if at all. Southerners preferred the introduction of slave states; Northerners preferred free states. The annexation of Texas raised two questions: Would the United States annex a large or small amount of territory? and Would the states admitted from the territory permit slavery or not? With these alternatives, the rank ordering of the various groups was as shown in table 1.

Assuming that these four groups have roughly equal numbers of voters, we can see that no one outcome can dominate the political process. Each policy option can be equally matched by any other policy option. For instance, if the question were between annexing a large amount of territory, all to be made free states, versus annexing a small amount of territory, all to be made slave states, the vote would show Northern Democrats and Whigs pitted against the Southerners of both parties. The deadlock could be broken only by some arbitrary event or by someone's crossing over party and sectional lines.

Table 1. Rank Ordering of Preferences for Four Groups

Party	Large/ Free	Large/ Slave	Small/ Free	Small/ Slave
Northern Democrat	1	2	3	4
Southern Democrat	3	1	4	2
Northern Whigs	2	4	1	3
Southern Whigs	4	3	2	1

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The Senate in 1844 was remarkably balanced, so this assumption of even numbers of voters holds. The 52 senators included 24 Democrats and 28 Whigs. The Democrats divided evenly, with 12 Northern and 12 Southern. Likewise, the Whig party divided evenly, with 14 Northern and 14 Southern. And of course, if we divide the Senate on purely sectional lines, the carefully crafted balance of slave and free states appears, with 26 senators from the slaveholding states and 26 from the states committed to free labor.

Another policy option could have dominated any of these four choices. The slavery issue could have been neutralized by bringing in territory suitable for either slavery or free labor and then dividing the territory into an equal number of slave and free states. And politicians did attempt to promote this option. Bringing in equal numbers of slave and free states would push the domestic and partisan issues to the periphery and allow the Senate to focus on the foreign-policy issues. As argued previously, the Senate probably would have ratified a treaty with Texas if foreign policy were the overriding consideration.

This approach had special appeal to two groups: Northern Democrats who hoped to gain the support of Southern voters in presidential races, and Southern Whigs who hoped for the support of Northern voters. A substantial subset of the Northern Democrats, along with a few Southern Democrats, strongly supported former President Martin Van Buren for the Democratic nomination in 1844. These Van Buren Democrats championed a distinctive combination of positions on the Texas annexation question. They proposed that the United States annex a modest amount of territory and carve it equally into slave and free states.[11] The Jacksonian Democratic party, which Van Buren had been instrumental in creating, drew its support from agriculturists, large and small, Northern and Southern. In addition, many members of the urban working class voted Democratic. The party was held together by its support of cheap land and low taxes and its opposition to monopoly and privilege. As the leaders of the largest national political coalition, the Van Buren Democrats had more to lose than any other single group from the introduction of explosive sectional issues. Therefore, this subset of the Democratic party did its best to mute the sectional aspects of the Texas question.

But Van Buren and his supporters were not the only ones to grasp the importance of neutralizing the slavery issue. Henry Clay, the most prominent of the Southern Whigs, also understood this point. As Clay ran his

11. The principle advocate of this position was Thomas Hart Benton, Democratic senator from Missouri and Van Buren's chief Senate operative. See his 16, 18, and 20 May 1844 speeches in the *Congressional Globe* (28th cong., 1st sess., appendix, pp. 474–86). His position will be analyzed in detail later.

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campaign for the presidential nomination of the Whig party, he did his best to keep the slavery issue neutralized. Indeed, both Van Buren and Clay wrote public letters on the Texas question, outlining just such positions.[12]

Let us define these Northern Democrats and Southern Whigs as Crossover voters. Competition for these voters formed the heart of political competition because the sectional/partisan blocks were completely deadlocked. As William Riker (1982) has pointed out, the heart of the game of politics is to reconfigure the issues to create winning coalitions. Let us assume for the sake of analysis that the Crossover politicians succeeded in luring away half of the Southern Whigs and half of the Northern Democrats.

With the possibility of neutralizing the slavery issue as a fifth policy, and the Crossover voters as a fifth voting block, the configuration of preferences of the various groups was as shown in table 2. It is evident by inspection that the annexation of a modest amount of territory, with the slavery issue neutralized, is a Condorcet winner. The last column can beat any other of the columns in pairwise competition. That is, annexing a modest amount of territory with the slavery question neutralized receives 2½ voting blocks, whereas each other alternative receives only 1½ voting blocks.

The reason for the dominance of this position is clear. Every one of the sectional/partisan blocks preferred that states be admitted in pairs, one free

Table 2. Rank Ordering of Preferences for Five Groups

Party	Large/ Free	Large/ Slave	Small/ Free	Small/ Slave	Modest/ Neutral
Northern Democrat (½)	1	2	4	5	3
Southern Democrat	4	1	5	2	3
Northern Whigs	2	5	1	4	3
Southern Whigs (½)	5	4	2	1	3
Crossover	3	5	2	4	1

12. Remarkably enough, both letters appeared in different newspapers on the same day. Clay's letter appeared in the *National Intelligencer* and Van Buren's in the Washington *Globe* on 27 April 1844.

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and one slave, rather than risk complete annihilation by the admission of unfriendly states. Both of the national candidates, Van Buren and Clay, argued for the admission of Texas on terms favorable to the entire Union rather than on terms tilted too far in favor of one section or the other. Van Buren was a Northern Democrat who relied on the support of Southerners. Clay was a Southern Whig who relied on the support of Northerners. Neither of them could afford to alienate a substantial portion of his constituency. No matter what his personal ideology, no candidate for the presidential nomination of one of the national parties could afford to run on a strictly sectional platform.

Even John C. Calhoun hid from the Texas question while seeking the Democratic nomination for President. Calhoun was and is known as the most radical defender of Southern interests. Later, as secretary of state, he played a central role in annexing Texas on the terms most favorable to the South. But as a presidential candidate, he avoided framing the Texas issue in sectional terms. Indeed, one of his confidants explicitly advised him to dodge the Texas question:

> the discussion of the Texas question at this time is injudicious.... No such issue should be made between Mr. Van Buren and yourself, because the admission of Texas into the Union would be regarded as a measure intended to strengthen the slave-holding interest of the South, and in this view of the question, the non-slave-holding States would oppose your election. The South itself is greatly divided upon this subject.[13]

As long as he was an active candidate for the Democratic party nomination, Calhoun could not afford to alienate his supporters outside the South.

This analysis of partisan and sectional preferences allows us to answer one of the questions posed at the outset: Why was Texas annexed in 1845 rather than earlier? Texas had petitioned for annexation in 1836, in the immediate aftermath of its revolution, and broached the subject on several occasions later. But the United States remained aloof until 1844. Why?

Partisan politics is surely a major part of the answer. Andrew Jackson was President in 1836. Considering his personal ideology as well as the interests of his constituents, one might have expected Jackson to snap up Texas at the first possible opportunity. Nevertheless, he not only denied the annexation petition but delayed even the recognition of Texan independence until the last day of his administration. Our analysis suggests that Jackson would have wanted to wait for an opportunity to annex Texas without creating a sectional and partisan uproar. Contemporary evidence supports

13. Edward Dixon to John C. Calhoun, 25 July 1843, in Calhoun (1959–1996, 17:314–15).

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this supposition. The Democratic Congress shared Jackson's reluctance to enter the sectional fray. As the Texas diplomats explained to their superiors,

> some of the members (of Congress) have openly avowed to me their reasons for wishing to postpone our recognition until the next Congress. It all proceeds from the Van Buren party. They are afraid that the subject of annexation will be pressed immediately after recognition;—that annexation or no annexation will be made the test of the elections for Congress during the ensuing summer;—that the North will be opposed and the South in favour of annexation, and that Mr. Van Buren will of course have the support of either the South or the North in mass accordingly as he favours or opposes annexation. The fear then of throwing Mr. Van Buren into a minority in the next Congress induces his friends to desire a postponement of recognition at present, thereby keeping down the exciting question of annexation at the next elections and giving Mr. Van Buren more time to manage his cards and consolidate his strength.[14]

The annexation question lay dormant throughout Van Buren's administration. He immediately became embattled by the Panic of 1837, a financial crisis brought on by actions of the Bank of England but for which he was largely blamed.[15] He never was able to consolidate his strength and manage his cards sufficiently to risk dealing with a divisive sectional issue like Texas.

The Hazards of the Annexation Issue

The reluctance of both Van Buren and Jackson to pursue Texas annexation testifies to the political dangers inherent in the issue. Still, this reluctance may seem odd in light of my previous argument that terms existed under which Texas could have been annexed even under a two-thirds rule. However, because the slavery issue could be framed in an inherently divisive way, politicians who operated on the fringes of the major national parties could use it to their advantage. A Northern Democrat such as Van Buren had to campaign for the nomination against Southerners who might accuse him of excessive timidity with regard to the annexation question. And a Southern Whig such as Henry Clay had to beware of Northerners within his own party who might resist the annexation of Texas on any terms.

Indeed, radicals from both sections did inflame the sectional aspects of the question from the moment of Texas independence until the annexation

14. William H. Wharton to Samuel Houston, 2 February 1837, in Garrison (1908, 1:179–80).

15. For this interpretation of the Panic of 1837, see Temin (1969).

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was finally consummated. In the North, Whig John Quincy Adams was the principle proponent of the view that the annexation of Texas would provide grounds for the dissolution of the Union by the Northern states.[16] In the South, Democrat John C. Calhoun, except when campaigning for the Democratic presidential nomination, pressed for bolder measures toward the recognition and annexation of Texas.[17] Promotion of these positions had the potential to siphon off support from the candidates nominated by the national parties.

Thus, in spite of the potential for annexing Texas as a "great national measure," the danger always existed that the issue would be transformed into a sectional and partisan battleground. A supermajority procedure would have blocked this strategy, at least for the Southern radicals. For these Southerners desperately wanted the incorporation of Texas into the Union, and dividing the polity would have killed the annexation.

Under a simple majority rule, on the other hand, a great many factors had to coincide in order to consummate the annexation without domestic political bloodshed. The possibility of British interference had to be appreciated as a real threat. The slavery issue had to be neutralized. And political party discipline and unity had to be sufficient to overcome the tendency for sectional factions to splinter within the national parties.

But two constitutional rules combined to offer a great temptation for third-party candidates to exploit the Texas question. We shall see that these constitutional rules drove the outcome in very specific ways. The annexation of Texas, which could have taken place under a two-thirds requirement, became far more contentious and was almost undermined by the availability of simple majority procedure.

16. See entry for 19 May 1838, in John Quincy Adams ([1795–1848] 1876, 9:535, 538; see also 10:20, and 11:71, 87, 101, 109, 114). See, as well, the discussions in the *Congressional Globe* (28th cong., 1st sess., pp. 64, 179–80, 194–95, 205, 229–30), for the discussions of the Massachusetts attempt to eliminate the three-fifths clause for apportioning representatives. During these discussions, Adams predicted that without such an amendment to the Constitution, "this Union would tumble into pieces." In the previous session, he had introduced a resolution calling for the peaceful dissolution of the Union. For Adams's most spectacular speech calling for the dissolution of the Union in the event of the annexation of Texas, see Adams ([1838] 1969, 14).

17. Calhoun's activism during the period after his candidacy for the presidency will be discussed in detail in the remainder of this article. For the period between 1836 and his term as secretary of state, see the following: For a discussion of his resolutions of 1836, see Benton (1854, 1:665–67). For his response the resolutions offered by Swift of Vermont in December 1837, see *Congressional Globe* (25th cong. 2 sess. p. 55). For the impact of South Carolina politics on the Texas question during the early 1840s, see Wilson's introduction to volume 14 of Calhoun (1959–1996, xviii–xxiii). See also Calhoun's letter to his daughter, 29 April 1840 in Calhoun (1959–1996, 15:187–88).

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The Constitution and the Annexation of Texas

Every historical episode includes a large element of chance, and the annexation of Texas was no exception. John Tyler, the president who ultimately annexed Texas, came to be known as "His Accidency" to his enemies and posterity alike. He ascended to the presidency only because his running mate, William Henry Harrison, contracted pneumonia on inauguration day and died within a month of taking office. John C. Calhoun became the secretary of state under whom annexation took place only because his predecessor at the State Department, Abel Upshur, was killed in a freak accident on board a gunboat.

Notwithstanding the randomness associated with the ascension of these two men to office, the institutional framework in which they operated exerted decisive influence on the events. The Whigs had chosen Tyler as their vice-presidential candidate to balance the ticket. Tyler, a states'-rights Virginian, was a Whig principally because he hated Andrew Jackson. In other words, the choice of Tyler as a vice-president was part of the Whig effort to patch together a national coalition big enough to win.

Tyler, however, proved to be more Southern than Whig. The leadership of the Whig party regarded him as a loose cannon almost from the moment he took office.[18] Tyler therefore quickly became a president without a party. Because of this alienation from his party, Tyler was certainly not a potential presidential nominee for the Whig party. Still, he possessed the advantages of incumbency. Hence, because of combination of the prominence of his office and his isolation from his party, Tyler had the potential to become a credible third-party candidate in the election of 1844.

When Tyler chose Calhoun as his secretary of state, the Senate unanimously confirmed his choice. Senators of all parties agreed that Calhoun was eminently qualified for the post. When Calhoun took office, the Senate expected that his major responsibility would be to handle the sensitive negotiations with Great Britain over the division of the Oregon Country. The treaty with Texas seemed to be a foregone conclusion at the time. Indeed, as Calhoun was considering whether to accept the secretaryship, one of his friends wrote to him:

18. For instance, Tyler's positions on money and banking issues were at variance with the mainstream of the Whig party. Most of Tyler's cabinet resigned en masse early in his administration (Pletcher 1973, 87).

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> I mention to you in confidence that the Texas question is in such a state, that in ten days after your arrival the Treaty of annexation, would be signed, and from poor [deceased Secretary of State] Upshur's count 40 senators would vote for it. The President says he has hopes of the acquiescence of Mexico.[19]

No one anticipated the intensity of the political uproar that the Texas issue would create.

The Temptations of the Constitution: Plurality Elections and the New-States Clause

Surprisingly, the treaty faltered in Calhoun's usually capable hands. To understand why, one must appreciate the temptations for political fragmentation created by the conjunction of two constitutional rules. First, the Constitution requires that the House of Representatives resolve presidential elections won by a plurality instead of a majority. This procedure provides an inducement for third parties who have no hope of winning a majority, or even a plurality, to campaign nonetheless. A third-party candidate occupies a very powerful position during the House deliberations: He can be the "president maker," extracting substantial concessions from the winner, even if he has no hope of winning himself.

By itself this provision could not have transformed the Texas issue. Tyler also needed an issue on which to run. The ideal issue would be sufficiently appealing to a significant subset of the polity, and one on which his position would be distinct. Article 4 of the Constitution—"New States may be admitted by the Congress into this Union"—allowed him to use Texas in this way. Admitting Texas directly to statehood, by a simple majority of both houses of Congress, bypassed the treaty process.

The importance of this possibility for Tyler's political future was that he could frame a treaty so that it strongly favored the South, thereby creating a Southern and expansionist constituency for himself. He could siphon off the most proexpansion members of the Democratic party, from both North and South. He might also attract the support of some of the Southern Whigs. And he could use Texas to create this constituency for himself without ultimately endangering the annexation.

"Southern Democratic candidate" was a viable third-party position, one that Calhoun's advisors suggested Calhoun himself try to attain when it became apparent that Calhoun would lose the national Democratic nomination. The Texas issue would be critical to the creation of this political niche, stated Calhoun's advisor, and the convention

19. George McDuffie to Calhoun, 5 March 1844, in Calhoun (1959–1996, 17:815).

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> nomination will still have such force, even in the Southern States as to preclude the hope, that a rally can be made against Mr. V[an].B[uren]. on the Anti-tariff protective principle alone, there are so many even of Southern men, who yield to the Doctrine of discrimination for incidental protection being admitted into a Revenue Tariff. It is necessary therefore to have some more exciting topic connected with it and this will be the Annexation of Texas....
>
> ...this is the only matter that will take sufficient hold of the feelings of the South, to rally it on a southern candidate and weaken Clay and Van Buren so much there as to bring the election into the House, where the Southern States would not dare to vote for Mr. V. B. and C[lay].[20]

But with Calhoun out of the race, Tyler immediately began to move himself into position. After Calhoun's address in which he publicly withdrew from consideration as a third-party candidate, one of Calhoun's friends wrote to him: "Since the appearance of your Address, the President's weak brain has been more disturbed than ever with the hope of the Presidency."[21] Indeed, one of Tyler's motives in appointing Calhoun to the State Department was to move Calhoun and his circle of radical Southerners securely into Tyler's political orbit. Robert Barnwell Rhett wrote to Calhoun:

> It is understood that the office of Secry of State will be offered to you. It was plainly stated to me by one in the President's confidence, that the honours of the Cabinet would be placed at our disposal provided we would go into Tyler's convention in May, and support him for the Presidency. Of course the President will not intimate any such conditions to you, but that he and his friends will expect should you take any appointment from him, that you and your friends should support him for the next Presidency, I have no doubt.[22]

If the Constitution had required a two-thirds majority for the admission of new states, as well as for the ratification of a treaty, the Texas issue would not have been available as an issue for a third-party candidate such as Tyler or Calhoun to use. For to divide the polity would have been to defeat the annexation.

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20. Virgil Maxcy to Calhoun, 10 December 1843, in Calhoun (1959–1996, 17:600–602).

21. Maxcy to Calhoun, 9 February 1844, in Calhoun (1959–1996, 17:777).

22. Robert Barnwell Rhett to Calhoun, 5 March 1844, in Calhoun (1959–1996, 816–17).

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Indeed, "poor Upshur's count" of forty favorable votes had been premised on the absence of Tyler or any other third-party candidate. In January 1844, Texan diplomat Isaac Van Zandt gave an unusually detailed explanation of his claim that an annexation treaty could command forty votes in the Senate:

> Mr. Tyler having withdrawn from the contest for Presidency the question neither is, nor will be considered in reference to him, but being supported by both whigs and democrats will not be determined as a party measure, but as a great national one, alike interesting to the whole Union....
>
> In looking to the senate to see who can be relied upon to sustain the measure, from all the information which I have derived, I give the following as my decided opinion. There is but little doubt in the minds of many that Mr. Clay will be elected to the Presidency. Some of his particular friends, viz. the Senators from Kentucky, together with Messrs. Archer and Mangum, in prospect of that event prefer the measure postponed in order that Mr. Clay may have the credit of effecting it, but at the same time, if the treaty be now made, will support it beyond doubt. Premising this I feel confident that we may rely upon the entire vote of the south and west, regardless of party, while at the north we may calculate on the whole democratic vote, and many say Mr. Tallmadge of the Whig party, though the latter may be considered doubtful. If I am correct then in my opinion a treaty might be submitted with a confident prospect of its ratification.[23]

Of fifty-two members of the Senate, twenty-six represented slaveholding states, presumably considered "Southern." In addition, there were twelve Northern and Western Democrats. These thirty-eight votes alone, without any additional Whig votes from the Northwest, provided more than the thirty-five required for two-thirds. Adding to this total the two Whig senators from Michigan and one Whig Senator from Indiana (then considered Western states) plus the doubtful Tallmadge of New York, one obtains a total of forty-two votes. Upshur's total of forty favorable votes appears plausible.

However, with Tyler in the race, all these calculations went out the window. He could win only by throwing the presidential race into the House of Representatives. Using Texas as an issue, he could siphon off the South-

23. Van Zandt to Anson Jones, 20 January 1844, in Garrison (1911 2:240–24). For an example of a historian befuddled by Upshur's vote count, see Merk (1972, 37).

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ern votes of both parties and the extreme expansionist votes of the North and West. By running on this issue, Tyler could force the two other candidates to deal with the Texas question whether they wanted to or not.

The Power of the Agenda Setter

So far, this analysis might seem plausible, except for one consideration: the presence of a potential Condorcet winner. Our earlier analysis showed that a treaty annexing a modest amount of territory, with the slavery issue neutralized, could beat all the competitors in pairwise competition. So, how could the radical Southerners, under the direction of Tyler and Calhoun, frame a treaty favorable to Southern interests, divide the polity, throw the presidential election into the House, and still annex Texas under the New-States Clause of the Constitution? Could not an alternative candidate, with a moderate Texas treaty, come forward and defeat the Tyler position?

To solve his puzzle, recall the power of the agenda setter. The Constitution gives the president power to set the agenda for the making of treaties, subject to ratification by two-thirds of the Senate. Tyler used this authority in two separate ways.

First, and most obviously, he framed a treaty very favorable to Southern interests. Evidently, he knew from the outset that the treaty he drew up would probably fail in the Senate. Members of the Texas diplomatic corps wrote home in April, just before the treaty was presented to the Senate:

> As it is not certain that the Senate of the United States will ratify the treaty which we have signed, the President of the United States assured us, before we agreed to sign and submit it, that he would, immediately upon its rejection by that body, should it be so disposed of, send to both Houses of Congress a message, recommending to them, in the strongest terms, the passage of a law annexing Texas as a state, under that provision of the constitution of this Government, which authorizes Congress to admit new states into the Union...it is confidently believed by the friends of Texas in the Congress of the United States, that such a law can be passed. It was under this view of the case that we agreed to frame the treaty and submit it to the Senate of the United States, under such doubtful chances for its ratification by that body.[24]

In the same letter, the diplomats confided that "had we been left to consult the wishes and disposition of the President and Cabinet" a much more favorable treaty could have been concluded. But those seeking the

24. Van Zandt and J. P. Henderson to Anson Jones, 12 April 1844, in Garrison (1911, 2:269–71).

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passage of the treaty, even under simple majority procedures, had to consider both parties and both sections, "avoiding on the one hand the very liberal terms which the Southern politicians would have been willing to grant us and the restrictions which the North would wish to impose." Thus, in the words of historian Justin Smith (1911), "the expedient of acquiring Texas by a joint resolution [of both Houses]...was unquestionably in reserve all the time" (281).

But the strategic use of agenda control went beyond the simple framing of the treaty on pro-Southern terms. Tyler's handling of the treaty also blocked the introduction of the only alternative that could defeat him. The territory he annexed could not credibly be neutralized on the slavery issue. Tyler sent the Senate a treaty that annexed the "Republic of Texas," that is, all of the territory Texas claimed for itself. This large expanse of territory would be difficult to carve into two roughly equal parts, one allowing and the other prohibiting slavery.

Moreover, annexing the Republic of Texas certainly would infuriate the Mexicans, who had already announced that they would consider this step equivalent to a declaration of war. By annexing Texas, the United States was also annexing the boundary dispute with Mexico; hence, the United States would acquire an indeterminate amount of territory in addition to the land claimed by Texas. No candidate, no matter how sincere, could credibly claim that an undetermined amount of territory, in an unknown location, could be divided equally into slave and free states. Therefore, the terms of the annexation made it almost impossible for the Condorcet winner to be introduced as an alternative.

In addition, Tyler and Calhoun introduced an element of urgency:. Annex Texas "All or nothing" and "Now or Never." They represented British interference with Texas as imminent and potentially devastating. But they diffused the potentially unifying impact of the British threat by portraying it as directed principally at the institution of slavery.

Just before the treaty was sent to the Senate, Calhoun wrote to the British attaché, relating American urgency about annexation to the potential abolition of slavery by the British in Texas.

> It is with concern the President regards the avowal of Lord Aberdeen of the desire of Great Britain to see slavery abolished in Texas;...That, from the geographical position of Texas, would expose the weakest and most vulnerable portion of our frontiers to inroads, and place, in the power of Great Britain, the most efficient means of effecting in neighboring States of this Union, what she avows it to be her desire to do in all countries, where slavery exists. To hazard consequences which would be so dangerous to the pros-

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> perity and safety of this Union, without resorting to the most effective means to prevent them, would be, on the part of the Federal Government, an abandonment of the most solemn obligation imposed by the guaranty, which the States, in adopting the Constitution, entered into to protect each other against whatever might endanger their safety, whether from within or without. Acting in obedience to this obligation, on which our Federal system of Government rests, the President directs me to inform you that a treaty has been concluded between the United States and Texas.[25]

This letter, soon leaked to the public, accomplished at least two objectives. First, Calhoun underlined the urgency of resolving the Texas issue, because, except for a few Northeastern Whigs, very few Americans would welcome a British abolitionist project on the North American continent. Second, the letter trapped many Northern Democrats who had moderately antislavery constituents. Even Northerners who had no wish to see a British-inspired abolition would hesitate before supporting annexation for the sole purpose of expanding slave territory. After all, Northern Democrats might want to migrate into that territory themselves and cultivate the land with their own free labor. By positioning the Texas question as a proslavery measure, Calhoun put the Northern Democrats in a very difficult position. Would they support their constituents' traditional expansionist views, or would they abandon Texas for the moment in hopes of generating a treaty more favorable to Northern interests?

We can now see how the two-thirds majority support for the treaty predicted in January 1844 evaporated by June. The forecast of forty favorable votes had been based on two assumptions: No third candidate would seek the presidency, and both Northerners and Southerners would regard British interference in Texas as a threat to the interests of all Americans. Calhoun's letter, leaked to the public on the same day that both Clay and Van Buren came out against a precipitous annexation of Texas, transformed the vote into a referendum on slavery. Thus, neither of the prerequisites for a successful Senate vote was satisfied any longer.

The Death of the Condorcet Winner

We can appreciate the potential strength of the Condorcet winner by noting that Tyler's opponents did attempt to propose an alternative treaty. Benton tried to reframe the Texas debate by specifically challenging the "All or Nothing" and "Now or Never" positions.

25. Calhoun to Pakenham, 18 April 1844, in Calhoun (1959–1996, 18:274–75). The treaty was signed on 12 April.

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He advocated that the treaty be renegotiated on two critical points. First, he insisted that the assent of Mexico be obtained. Obviously, this would diminish the threat of war and therefore remove most of the uncertainty about of the actual size of the acquisition. Second, and closely related, Benton advocated the annexation of a more modestly defined Texas. In particular, he advocated the annexation of the old Mexican province of Texas as well as the territory between the Arkansas and the Red Rivers. This smaller annexation, of course, would increase the likelihood of Mexican assent. Equally important, the annexation of this particular tract of land made neutralizing the slavery question more likely, as Benton also proposed dividing the territory into one free state and one slave state. The remaining land was to be formed into a territory from which only a single slave state could be formed.

Benton and his block of Van Buren Democrats defeated the treaty in the Senate in June. The voting was highly partisan: the Whigs and the Van Buren Democrats voted against the treaty, while the other Democrats, North and South alike, voted for it. If Calhoun's strategy had been to attract Southern Whigs, it had completely failed: only one Southern Whig voted for the treaty.

But the president's power to set the foreign-policy agenda could not be blocked indefinitely even by a senator as influential as Benton. Tyler introduced a resolution into the House of Representatives calling for the annexation of Texas on essentially the same terms as the defeated treaty. This bill admitted Texas into the Union directly as a state, completely bypassing the territorial stage of government. It dealt with the problem of Texas' huge size by permitting the state to divide itself into four additional states. The overwhelmingly Democratic House passed this bill by a comfortable majority, 120 to 98, although not by a two-thirds majority. Again the Southern Whigs failed to rally around the treaty. Northern Democrats split, 53 votes in favor, 28 opposed. If half of the pro-Texas votes from the Northern Democrats had been cast instead against annexation, the measure would have failed. Despite Calhoun's best efforts to cast it as a sectional measure, the annexation of Texas was, at its heart, still a profoundly partisan question, as table 3 shows.

The only remaining hurdle was to garner a simple majority in the Senate. One circumstance that favored the passage of the treaty in the Senate in January 1845 was that the presidential election was over. James K. Polk, who had snatched the Democratic nomination from Van Buren partially because of their differing positions on Texas, had been elected President. The use of the Texas issue for playing presidential politics was over.

The "immediate annexation" wing of the Democratic party naturally claimed Polk's victory as a mandate for their cause. This interpretation was

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Table 3. House of Representatives Vote on the Annexation of Texas: 25 January 1845

	Yes	No
Northern Democrats	53	28
Southern Democrats	58	1
Northern Whigs	0	52
Southern Whigs	9	17

more dubious than such claims usually are, because Polk did not win by anything like a landslide. He carried New York by a mere 5,000 votes. If Polk had lost New York's thirty-six electoral votes, Clay would have been elected president. And Polk certainly did not carry New York because of his position on Texas.[26]

In the Senate, Benton's bill, introduced in December 1844, differed from the treaty, and from the House bill, in several important particulars. Benton had backed away from his earlier insistence that Mexico consent to the annexation, but he still provided for a commission to negotiate boundaries with both Mexico and Texas. His bill also specified the extent of the territory more exactly than any other proposal (*Congressional Globe,* 28th cong., 2d sess., p. 19). Benton's new bill continued to give the slaveholding region one entry in the territorial derby, namely, Texas itself, while effectively neutralizing the remainder of the annexed territory.

But Benton had to admit that the Senate would never agree to this detailed proposal. The immediate annexationists controlled not only the foreign-policy agenda but also all the executive patronage. Polk was in the process of appointing his cabinet while the Senate debated the Texas question. Benton could no longer credibly hold out. On 5 February, he retracted his bill and replaced it with another, more general proposal (*Congressional Globe,* 28th cong., 2d sess., p. 244).

The most critical element of his new plan was that the president would send commissioners to negotiate the boundary. Benton argued that because the Senate had already rejected the terms of the House bill, reopening the negotiations with Texas would be necessary in any event. But reopening the negotiations would have to be done by incoming President James K. Polk.

26. See Tyler's annual message to Congress (*Congressional Globe,* 28th cong., 2d sess., p. 4) and Sellers (1966, 153–57).

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With one week remaining of the lame-duck congressional session, the fate of the annexation project hung by a thread. Finally, a proposal was made to combine the House bill with Benton's option of sending commissioners and allow the president to choose between this proposal and the House bill. Benton and his followers were understandably reluctant to allow this discretion to President Tyler, whom they did not trust, but they were assured both that the choice would be exercised by Polk and that Polk definitely preferred Benton's plan. The Van Buren and Benton Democrats believed that Polk owed his election to them. They also knew full well that the passage of any annexation bill depended on their votes in the Senate. They expected that if they gave the new president an annexation bill, he would satisfy them with regard to the method of annexation.

The Senate passed the bill on 27 February by a vote of twenty-seven to twenty-five. There had been not a single vote to spare. Again the vote was strictly partisan: all twenty-four Democrats plus three Southern Whigs voted for the bill combining the House version and Benton's commissioners. Among the Democratic votes were all the Van Buren Democrats who had voted against the treaty in June. Without question, the bill could not have passed without the support of these men. And they gave their support on the assumption that Tyler would "not have the audacity to meddle" with annexation (*Congressional Globe,* 28th cong., 2d sess., p. 362).

But they miscalculated Tyler's daring. He signed the bill for the annexation of Texas on 1 March. On 3 March, the last day of his administration, he sent a messenger to Texas, offering annexation under the House terms.

The Van Buren Democrats also underestimated Polk's audacity. Despite Polk's assurances that he favored Benton's procedure, when he took office he failed to recall the messenger, which was certainly within his power to do. Moreover, he continued to need the votes of the Benton faction to confirm his cabinet choices. Even after taking office, he assured some of Benton's followers that he needed his cabinet organized quickly so that he could recall Tyler's messenger and revoke his orders (Sellers 1966, 217).

But Polk never recalled the messenger. When the Senate's special session ended on 20 March, Polk had not made any nominations to fill the positions of special commissioners to Texas. Benton and his group realized, finally, that they had been used. But the deed had been done: Texas was annexed on the pro-Southern terms passed by the House.

Conclusion

The potential vote deadlock was broken by the decision-making institutions. The Constitution gives the president power to set the foreign-policy agenda, and John Tyler used this power fully. The Constitution permits the admis-

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sion of new states by simple majority vote of Congress, and Tyler took full advantage of that possibility. The constitutional rule requiring the House to resolve plurality elections invited Tyler to search for an issue with which to divide the polity. The New-States Clause allowed him to use the Texas issue for that purpose. Although ultimately he did not run in the 1844 election, his presence in the nominating phase of the race certainly influenced the Democratic party to select James K. Polk as its candidate. Plainly, if any of these rules had been different, the annexation of Texas would have proceeded differently.

Despite the existence of a Condorcet winner that could potentially garner a two-thirds majority, the polity could not find its way to that winner under the prevailing decision-making rules. Tyler used his agenda control to generate a set of alternatives that would create deadlock, for only in a deadlocked situation can the agenda setter fully exploit his potential power. The potential gridlock inherent in situations without Condorcet winners was broken by the decision-making structure.

But we know that gridlock is not the only problem in such situations. Even after an outcome has been achieved, the absence of a Condorcet winner makes that outcome unstable because a dissatisfied *majority* correctly believes it would have been better served by a somewhat different outcome. If it can grasp the reigns of the decision-making process, a new coalition can create a new outcome inconsistent with, or at least different from, the previous one. So it is no surprise that after the annexation of Texas, Americans continued to debate the Texas question until the Compromise of 1850, which finally resolved the remaining questions about the division of Texas, the expansion of slavery, and the financial consequences of acquiring Texas.

Even this, however, did not end the instability. The war predicted by the opponents of the treaty came to pass, and the territory acquired through the Mexican War divided Americans until the outbreak of the Civil War. Indeed, it is not too much to say that the territory acquired from Mexico was the proximate cause of the Civil War itself.

Had the Constitution plainly required a supermajority for the admission of new states, this sequence of events would not have occurred. The United States would have annexed a modestly-defined Texas, making enough concessions to Mexico to avoid war. If a two-thirds majority had been required, the terms of the annexation would have had to be acceptable to a wider set of Americans than the annexation that actually took place. It seems reasonable to suppose that neutralizing the impact of slavery by dividing the territory into equal numbers of slave and free states would have been a condition of the acquisition from the very beginning. No coalition could have rammed a lopsided acquisition down the throats of the rest of the country.

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Most probably, other Mexican territory ultimately would have fallen under the control of the United States, simply because Mexico did not possess the power to govern it. If it had passed to the United States gradually, and relatively peacefully, who knows what U.S. relations with Mexico might be today? Who knows what course Mexican history might have taken if its fledgling democracy had not engaged the military might of the United States?

Every one of these dire consequences had been predicted by the opponents of the immediate annexation of Texas. These opponents, particularly Martin Van Buren and Henry Clay, were not naysaying opponents of American expansion, as they were depicted by their political enemies. They tried to bring Texas into the Union on terms that would unify rather than divide their countrymen. But the temptations created by the Constitution, particularly the New-States Clause, proved irresistible to sectional politicians. These politicians, it must be said, played strictly by the rules. The actions of Tyler, Calhoun, and Polk were perfectly legal and constitutional. However, we can see in retrospect that different constitutional rules would have led to a different and undoubtedly better outcome. For the United States eventually could have had the benefits of expansion into nearly the same territory without the costs of a bloody war with its neighbor and a fratricidal civil war at home.

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Has John Roemer Resurrected Market Socialism?

MICHAEL WOHLGEMUTH

John E. Roemer, a leading socialist economist, has recently proclaimed a "Future for Socialism" (Roemer 1994). His book is advertised as being "measured, highly accessible, and most of all compelling." I have come to the opposite conclusions. Roemer's most provocative assertion is his claim to have found "ways of reformulating the concept of market socialism in response to the Hayekian critique" (2). In his attempt to convince central planners as well as communitarians in the socialist camp of the virtues of the market, Roemer indeed goes a long way in accepting the objections that Friedrich A. Hayek and others put forward during the calculation debate of the 1930s. It is helpful to recall the debate on socialist economics from the early warnings of Ludwig von Mises and Hayek to the later analyses of Yugoslav and Hungarian market socialism by Svetozar Pejovich or János Kornai. These critiques form the background of what Roemer calls the "fifth generation" of market-socialist proposals, which he claims lack the defects of those associated with former generations.

Whether this assertion can be substantiated is the central question of this article. First, we must reconstruct Roemer's model of market socialism. Because Roemer leaves important elements of this system unexplained or unconnected, my account can only mirror his eclecticism, but I shall try to avoid unfriendly misreadings. Next I shall describe Roemer's own normative scheme of reference, finding his concept of "equal opportunities" highly ambiguous. Furthermore, whatever the interpretation of equal opportuni-

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ties, it is hardly reconcilable with the effects that Roemer's proposals for institutional reform must be expected to have. I analyze these effects in the following sections. They all involve substantial obstructions of market competition in different dimensions and can be summarized as evidence of a fundamental conclusion: spontaneous market competition and egalitarian market socialism are as incompatible as Hayek and other critics always believed them to be.

Four Generations of Socialist Miscarriages: The Debates in Retrospect

According to Roemer (1994, chap. 4), the market-socialism debate has now entered its fifth stage. My recapitulation of the preceding four generations of market-socialist ideas and refutations serves a twofold purpose: (1) to show that the debate was a catalyst in the development of Austrian ideas of the market process; and (2) to show the defects of former market-socialist ideas that Roemer now claims to have avoided.

The Calculation Debate

The theoretical deliberations on the economics of socialism began with "the belief that socialism will dispense entirely with calculation in terms of value and will replace it with some sort of calculation *in natura* based on some units of energy or some other physical magnitude" (Hayek [1940] 1994, 235). This view, traditionally held by European Marxists such as Friedrich Engels or Karl Kautsky, was first challenged by Mises ([1920] 1994). Mises provoked socialist economists to enter the debate with his "impossibility theorem," usually summarized as follows: there is no basis for rational calculations of value if there are no market prices; and there are no market prices without the voluntary exchange of private property rights. Hence, if socialists want to allocate of resources "rationally"—sacrificing a less-valued opportunity in favor of a more highly valued one in view of consumers' preferences and producers' capabilities—they cannot at the same time dispense with production goods as objects of market exchange. Only full-fledged capital markets reveal monetary values of production goods and thus provide information and incentives necessary for a rational use of the means of production. One decisive qualification Mises probably considered unnecessary to dwell on at length. Its due consideration by his critics, however, would have avoided many misunderstandings:

> The static state can dispense with economic calculation. For here the same events in economic life are ever recurring.... But...our economic data are ever changing, so that the static nature of economic activity is only a theoretical assumption corresponding to

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> no real state of affairs.... Thus, in the socialist commonwealth every economic change becomes an undertaking whose success can be neither appraised in advance nor later retrospectively determined. There is only groping in the dark. (Mises [1920] 1994, 16)

In addition, appreciating the knowledge problem arising from "the uncertainty of future conditions, which is an inevitable concomitant of the dynamic nature of economic life" (17), Mises clearly foresaw the incentive problems of expropriated socialist actors. Not only the signaling function of market prices but also their controlling and motivating qualities depend on free markets for the exchange of private property. Mises understood that "the exclusion of free initiative and individual responsibility...constitutes the most serious menace to the socialist economic organization" (20).

Perceiving Mises's twofold argument in this way instead of just picking his bluntly stated conclusions—"Where there is no free market, there is no pricing mechanism, without a pricing mechanism, there is no economic calculation" (17)—one is compelled to conclude that the replies of socialist economists badly missed the point. They hardly ever considered the incentive problems of planners and producers. Their "possibility theorems" rested on static economic theories in which all circumstances relevant for economic calculation are assumed to be constant and "given." Hence they referred to a utopian state for which even Mises denied a serious calculation problem. Contrary to the declarations of critics and reviewers throughout the subsequent generations, we must conclude that Mises's criticism was not actually refuted. Still, the discussion led to the "realization by socialists that prices must be used for economic calculation under socialism" (Roemer 1994, 28), as expressed by Oscar Lange in his gibing praise: "Socialists have certainly reason to be grateful to Professor Mises, the great *advocatus diaboli* of their cause. For it was his powerful challenge that forced socialists to recognize the importance of an adequate system of economic accounting to guide the allocation of resources in a socialist economy" (Lange [1936] 1994b, 252).

This recognition led to a second stage of socialist economics "characterized by the view that it would be possible to calculate the prices at which general equilibrium would be reached in a socialist economy by solving a complicated system of simultaneous equations—and so socialism need only await the invention of powerful computers" (Roemer 1994, 28).[1] The

1. See for example, Taylor (1929) or Dickinson (1933). Computopia fallacies remained fashionable in later works of Lange ([1965] 1994a). Even Kenneth Arrow (1974) once adhered to this nirvana: "Indeed, with the development of mathematical programming and high-speed computers, the centralized alternative no longer seems preposterous. After all, it would appear that one could mimic the workings of a decentralized system by an appropriately chosen centralized algorithm" (5).

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equations of general equilibrium as depicted by Leon Walras, Vilfredo Pareto, and Enrico Barone were presented as proof of the possibility of rational socialist calculation. To prove that abstract equations have an equally abstract solution in terms of equilibrium values that ought to guide central planning agencies was not, however, to prove that they could in practice be of any use in the absence of a market for the exchange of property rights. The debate remained as open as ever. Hayek ([1935] 1948b, 153ff.) stressed the inadequacy of the metaphor of the Walrasian auctioneer as a description of market processes and as a prescription for planning purposes. Later he summarized his view as follows:

> The problem is thus in no way solved if we can show that all the facts, if they were known to a single mind (as we hypothetically assume them to be given to the observing economist), would uniquely determine the solution; instead we must show how a solution is produced by the interactions of people each of whom possesses only partial knowledge. To assume all the knowledge to be given to us as the explaining economists is to assume the problem away and to disregard everything that is important and significant in the real world. (Hayek 1945, 530)

Hayek's insistence on recognizing the practical problems of centralizing the knowledge necessary to mimic the workings of competitive capitalism induced Lange to open the third stage of the debate by making some "practical" proposals. Only then did the term *market socialism* attain some institutional context as a result of "the realization...that actual markets would indeed be required to find the socialist equilibrium—and this because the central planning bureau could not possibly have the information necessary to make the calculation" (Roemer 1994, 28f.). Prices for consumer goods would be set in actual markets; even wages would be determined by decentralized bargaining in real labor markets. "But there is no market for capital goods and productive resources outside of labour" (Lange [1936] 1994b, 260). Here the Central Planning Board (CPB) would replace market transactions, conducting a procedure of trial and error analogous to the *tâtonnement* of the Walrasian auctioneer (259ff.).

It would start by decreeing randomly chosen prices for the collectively owned producer goods. All managers ("assumed to be public officials" [260]) are instructed to set output so that price equals marginal cost, taking the prices of inputs and of their products as given; hence firms are mandated to act *as if* they were suppliers under perfect competition. The CPB now checks whether any shortages or surpluses of factors and goods exist and corrects its errors by new trials, altering prices until it finds the market-clearing ones. Thus, Lange argues:

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> The Central Planning Board performs the functions of the market. It establishes the rules for combining factors of production and choosing the scale of output of a plant, for determining the output of an industry, for the allocation of resources, and for the parametric use of prices in accounting. Finally, it fixes the prices so as to balance the quantity supplied and demanded of each commodity. It follows that a substitution of planning for the functions of the market is quite possible and workable. ([1936] 1994b, 263)

Hayek [1940] 1994 challenged this conclusion,[2] contrasting the practicability and performance of Lange's system of centralized information and decreed prices with a market system "where the required changes are brought about by the spontaneous action of the persons immediately concerned" (240). All his objections pertain to fundamental shortcomings of the neoclassical paradigm or to an "excessive preoccupation with problems of the pure theory of stationary equilibrium" (240).

First, because of "the daily changing conditions in different places and different industries" (240), Lange's bureaucratic *tâtonnement* will not converge. At each phase of the cumbersome procedure, the specific circumstances to which rational calculation ought to adapt will already have changed again. While decentralized market procedures elicit rapid and differentiated adjustments, centralized trial and error can react only with delays and undue generalizations.

Second, undue generalizations must occur because of the heterogeneous character of production goods. Economically, each machine of a different age or in different combinations has its individual value. The CPB can hardly even know of their overall existence; even less can it fix particular values in terms of the shadow prices of each of the different production goods. Furthermore, the *tâtonnement* procedure is inapplicable to nonstandardized commodities, which form a great part of the socialized production goods (e.g., machinery, buildings, and ships produced only on

2. It should be noted that Mises did not leave the debate at the first stage (Roemer does not mention Mises's contribution at all!). Even though his reactions to *market* socialism were not as prominent as Hayek's prompt and detailed rebuttal of Lange, they were equally substantive. Mises ([1949] 1966, chap. 26) now stressed the lack of capital markets, which alone can generate reliable asset prices and interest rates as the basis of factor evaluations in changing environments. The relevant aspect of human action is speculation and investment. Mises argued that "one cannot *play* speculation and investment. The speculators and investors expose their own wealth, their own destiny. This fact makes them responsible to the consumers" (709). In the Austrian camp, a fierce debate has recently occurred about whether Mises or Hayek gave the "right" and "final" answer to socialist planning (see the last three years of the *Review of Austrian Economics*). This is not the place to contribute to the internal Austrian debate; I agree with Kirzner (1996) that the view of two conflicting Austrian paradigms is based on grave exaggerations and misunderstandings sometimes even leading to lamentable "verbal terrorism" (148). It may be more rewarding to return to the debate with socialist proposals that should not remain unnoticed.

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special conact). For such goods, the CPB has no market-clearing prices to decree in advance; hence it would have to take "all the functions of the entrepreneur on itself" (241).

Third, the managers, even if loyal and capable, cannot be expected to find the lowest-cost production methods. Because the CPB is confined to establishing uniform prices for goods of economically different value, "the managers of production will have no inducement, and even no real possibility, to make use of special opportunities, special bargains, and all the little advantages offered by their special local conditions" (244). This nonresponsiveness also reflects their obligation to treat prices as "given." As pure quantity adjusters with price competition outlawed, managers have no reason to "incur extra costs to remedy a sudden scarcity, since a local or temporary scarcity could not affect prices until the official machinery has acted" (244). In an evolutionary and complex environment, forced marginal-cost calculations based on artificially sticky and uniform prices must lead to a misallocation of resources.

Fourth, for the same reason, there is no room for entry and innovation. Decreed prices destroy

> the opportunity for anybody who knows a cheaper method to come in at his own risk and attract customers by underbidding the other producers.... Since the man with the new idea will have no possibility of establishing himself by undercutting, the new idea cannot be proved by experiment until he has convinced [the CPB] that his way of producing the thing is cheaper. (247)

Indeed, just as innovation cannot be depicted in Walrasian equilibrium formulas, it cannot be managed in Lange's price-fixing procedures. Because the new good or technique has no established market, the CPB has no price to fix in advance. For the same reason, technical knowledge is usually assumed to be "given" in the neoclassical model of the market. To assume every producer's know-how to be equally available to the CPB, however, turns an assumption of a static environment into a pretense of knowledge.[3]

As Hayek switched from considering problems of theoretical possibility to considering those of practical workability concerning market socialism, he discovered theoretical inadequacies of the neoclassical paradigm concerning core questions of economics. The ensuing reactions of the scientific com-

3. This point was made earlier by Hayek ([1935] 1948b, 155). Here, he also anticipated some of Polanyi's (1967) ideas on the tacit dimension of subjective knowledge: "much of the knowledge that is actually utilized is by no means 'in existence' in this ready-made form. Most of it consists in a technique of thought which enables an individual engineer to find new solutions rapidly as soon as he is confronted with new constellations of circumstances" (155). There is no justification "to assume that the concentration of knowledge at the central authority would also include a capacity to discover any improvement of this sort" (155).

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munity can be interpreted as exemplary vindications of Kuhnian themes: the neoclassical camp failed to perceive the focus and rigor of the critique and remained confident that Lange's claims had not been seriously damaged.[4] The Austrians, in turn, gradually realized that they had reformulated the economic problem in a fundamental way.[5] A growing awareness of paradigmatic incompatibilities led them to develop their own research program based on such notions as "competition as a discovery procedure" (Hayek [1968] 1978a), "competition and entrepreneurship" (Kirzner 1973), and "the market as an economic process" (Lachmann 1986).[6]

Modern Variants of Market Socialism

Roemer (1994, 32) assigns the fourth stage to the first real-life attempts to establish forms of market socialism in Yugoslavia (1950), Hungary (1968), China (1978), and Poland (1980s). In all cases, Soviet-type central planning was partly replaced by other systems of reluctantly decentralized decision-making. These experiments yielded the first empirical evidence on the performance of market socialism, thus allowing the debate to turn from the practical relevance of theories to theoretical explanations of reality.[7] The first stages of the debate on market socialism fostered the formulation of Austrian theories of the market process, but empirical examination, especially of the Yugoslav and Hungarian experiments, contributed to the development of property-rights theories and comparative institutional analysis.

Furubotn and Pejovich (1972, 1973) analyzed Yugoslav worker-managed firms and compared them to capitalist corporations. They emphasized the interconnectedness of property rights, transaction costs, incentives, and economic behavior. In terms of property rights, the Yugoslav system can be described as follows: (1) the workers' collective has the right to produce, buy, or sell most capital goods; and (2) it owns the residual net profits, which it allocates between the wage fund and retained earnings for reinvestment; but (3) "the employees can neither sell the rights specified above nor continue to enjoy them when they leave the employ of the firm" (Pejovich [1976] 1979, 152).

4. The view that the socialists had "won" the debate can be found in most retrospectives at least until the 1980s. See the critical survey of Lavoie (1985, 10ff).

5. See also Kirzner (1988), Vaughn (1994, chap. 3), or Keizer (1994).

6. For an overview, see Streit (1993) or Vaughn (1994). Meanwhile, in his famous *Road to Serfdom,* Hayek (1944) added a political warning of creeping totalitarianism, stressing his early prediction that partial attempts to plan "will necessitate further and further measures of control until all economic activity is brought under one central authority" ([1935] 1994, 134).

7. The blueprints of Lange, Lerner, or Taylor were hardly influential in designing the reforms. A theory of the labor-managed firm did not exist at the time it was tried out in Yugoslavia. It was delivered later, by such individuals as Ward (1958) and Vanek (1970).

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The incentives in this arrangement give rise to certain behavioral patterns of self-interested actors: neglect of reinvestments in favor of consumption via the wage fund, massive debt-financed expenditures instead of self-financed investments, and a particular reluctance to hire new workers who would share the wage fund. The economic results of such incentive schemes can be observed and explained: "inflation, unemployment, the liquidity crisis, low level of self-financed investment and the virtually complete dependence of business firms on the banks—can be traced to the incentive patterns generated by the prevailing property relations and the absence of capital markets" (161).

Similarly, the Hungarian experiment, which relied on a combination of limited central planning and limited market coordination (both restricted in favor of increased indirect regulation and bargaining), permitted a fruitful analysis of the effects of rules on individual behavior and social outcomes. The property rights of both the regulating bureaucracy and the managers in highly monopolized industries were insufficiently specified and distinguished. Decisions on prices, taxes, subsidies, credits and investment projects arose mostly from bargaining as Hungary's "third way" around the discipline of both the market and direct central planning. János Kornai (e.g., 1992) made the most influential theoretical assessment. His analysis, which also helps to explain failures of corporatistic rent-seeking in capitalist welfare states, centers on the political economy of the "soft budget constraint" (Kornai 1986): semi-independent firms and political agencies both escape individual responsibility for inefficiencies, losses, and mistakes as competition in capital and goods markets is corporatistically administered and politically cushioned.

According to Roemer (1994, 33), the debate on market socialism has now entered its fifth stage. Market socialists of the fifth generation are described as having inherited from their ancestors not much more than a set of egalitarian ends; in terms of means, they claim to have cut the umbilical cord from earlier socialists such as Lange, with Hayek and Kornai being the foremost obstetricians:

> Not only have the proponents of market socialism retracted Lange's insistence that industrial prices be set by the planners instead of the market, but they have also dispensed with public ownership (in the sense of exclusive state control) of firms.... Kornai's and Hayek's point has been accepted, that as long as the government cannot credibly commit itself to noninterference in the competitive process, managers will not be profit-maximizers and economic inefficiency will result. (Roemer 1994, 34f.)

Today we find various models, most of them relying on "real" markets and competition within a wide spectrum of different combinations of man-

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agement-, labor- or state-run firms. They are owned or financed by shareholders with differently restricted rights to dispose of their assets, by more or less state-owned banks and other firms, by the workers themselves, or by the state.[8] They all share a commitment to egalitarian values, but differ in their specific contents and policy implications.[9] The youngest generation of market socialists is large and fragmented; the family ties are too loose to justify discussion of the whole family as one. Therefore, I have selected one proponent for a more substantiated presentation and critique. I chose the work of Roemer (1994) because this author claims that his model is particularly immune against failures of former market socialist models.

Roemer's Market Socialism: Compromising on Market Competition and Equal Opportunities

It is extremely difficult to extract a consistent line of reasoning from Roemer's mixture of anticapitalist and promarket rhetoric as well as his vindications and accusations of real-life socialism. It is equally difficult to identify a coherent and comprehensive specification of his own system of market socialism. However, the reader gets at least some clear statements about what Roemer's market socialism *is not:* "direct control of firms by the state is not necessary for socialist goals" (4); and labor-managed firms are also rejected as inefficient substitutes for markets (122f.). In both instances, Roemer attributes the failures mainly to inappropriate incentives to work efficiently, to make use of decentralized knowledge, and to seek innovation—the characteristic effects of the "soft budget constraint," unsolved principal-agent problems, and insufficient competition. In Roemer's model, therefore, neither central planners nor workers' committees are supposed to "own" firms in the sense of deciding how to produce, invest, and share the surplus.

One is impelled to ask: Socialism, where is thy sting? Where are the systemic differences between this form and capitalist systems? Once more, the clearest answer is a negative one: "Under market socialism, the poor are precluded from liquidating their shares" (73).

Indeed, this condition remains the only continuous feature of Roemer's system of market socialism: coupons are substituted for transferable shares. This idea, however, appears in three different, even contradictory presentations. Proceeding through the three stages of Roemer's approach, one finds

8. For an overview, see Roemer (1994, chap. 6). The variety of "fifth-generation" models of market socialism is further increased when one takes references in the essays collected in Roosevelt and Belkin (1995), Bardhan and Roemer (1993), Le Grand and Estrin (1989) or in the approaches of Pierson (1995), Arnold (1994), Miller (1994), Yunker (1992, 1993), Nove (1991), and Brus and Laski (1989).

9. See, for example, Miller (1993), Arneson (1993), or Plant (1989).

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that the significance of the coupon system, but also of market coordination, gives way more and more to traditional forms of socialist state intervention.

Coupon-Market Socialism: A First Approach

In a first formal presentation of a neoclassical model depicting a "market-socialist politico-economic equilibrium" (chap. 8), the existence of coupons instead of transferable shares is the only institutional assumption that sets the system apart from capitalism: "The coupon economy is equivalent to the capitalist economy except for one missing market: one cannot trade coupons for the good" (73). In Roemer's model of an economy with one good (representing the national product), every adult citizen receives a fixed amount of coupons, which cannot be sold in exchange for money. Coupons, like capitalist stock, are entitlements to firms' profits that can be invested in firms of the individuals' choice, but unlike capitalist stock they cannot be sold or bequeathed. In terms of property rights, coupons lack the attribute of transferability. "All else," Roemer states, "is the same as in the description of the C[apitalist] P[olitical] E[conomic] E[quilibrium]" (67). We must infer that in this model, firms are actually financed by coupon holders and private banks and that speculation on coupon dividends is assumed to create the same incentives for investors to incur information costs and for entrepreneurs to act in the interests of principals and consumers as under capitalism. We must also infer that savings and investments are coordinated through an interest-rate mechanism just as in a capitalist economy and that labor markets also are no different from those in market economies.

Most of these hidden *ceteris paribus* assumptions (in the sense of "all else remains equal to capitalist economies") are either withdrawn by Roemer himself in the following paragraphs or must be doubted by a critical reader right from the beginning. Nevertheless, from this simplistic model, Roemer draws far-reaching conclusions: "public bads" would be drastically reduced in coupon-market socialism, thus increasing "total utility in the population" (71). The logic is as follows: in capitalism, a few "rich" own the firms; in a coupon system, the many "poor will be the controlling group in most firms, as they own the majority of coupons in society. Thus, the firms will choose their levels of investments in the interests of the poor" (68). Because the "poor" are assumed to amount to a vast majority (95 percent) of the population (73)[10] and everyone's coupon holdings are the same, there is much less concentration of stock ownership. The latter, in turn, is made

10. This assumption is upheld in the capitalist as well as the market-socialist environment! The labor market is not integrated in Roemer's model. All the egalitarian thrust is on the stock market due to Roemer's "skepticism concerning the existence of alternatives to a competitive labor market for allocating labor in an efficient manner" (120).

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responsible for people's views on "the optimal level of the public bad" (65): the larger the fraction an individual asset-holder owns in the stock of firms, the higher the level of public bads he or she would permit, as private profits would be concentrated in a few owners, whereas the concomitant public bads would be widely dispersed. Roemer's concepts of "public bads,"[11] typical interests of "the rich" and of "the poor," and firm management as "a perfect agent of the firm's controlling group" (75) are dubious. To add to the confusion, Roemer assumes that "the level of the public bad is the outcome of the political process"; hence firms (socialist or capitalist) are assumed to treat the level of public bads as "given" (66f.), even though they "produce" them.

Coupons and the Banking System: A Second Approach

Some of the open questions about crucial elements of Roemer's market socialism are answered in the following paragraphs, which may move away from formal modeling to the consideration of real institutions. These answers, however, partly contradict the *ceteris paribus* assumptions (all else remains equal to ordinary capitalist economies) referred to earlier. Now (chap. 9) we are told that firms can *not* use the coupon stock market for raising capital (76).[12] Therefore, a banking system has to be introduced. According to Roemer,

> firms in the coupon economy would be organized around a fairly small number of main banks, as in the Japanese *keiretsu*. A main bank would be primarily responsible for putting together loan consortia to finance the operations of the firms in its group; it would, correlatively, be responsible for monitoring these firms. (76)

Roemer gives no further specifications concerning those formal and informal institutions of a Japanese *keiretsu* that he wants to imitate. We can infer only that "the universe of public firms is partitioned into groups" and that the firms in each group "are associated with a main bank" (49). The ownership of banks is not further discussed; it is only casually assumed "that they are publicly owned in the sense that their profits go in large part directly to the state treasury" (156, n.3). Hence, we find here a different type of public

11. I could find no sound, coherent theoretical reasoning on these matters. The traditional concept of public bads is made virtually unoperative by including all sorts of things anathema to socialists, including unemployment, pollution, imperialistic wars, apartheid, noxious advertising, fast assembly-line speeds, and low taxes on profits.

12. Note that the assertion that under a regime of coupons "the poor will be the controlling group in most firms" (68) becomes totally incredible under the specifications given now. If coupon holders neither give nor withdraw any means relevant for firms, how do they control? Why should firms "choose their levels of investments in the interest of the poor" (68) if the "poor" only take their share of profits but cannot give their share of investment?

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ownership without being given an explanation of why the alleged virtues of the coupon system should not apply to the ownership of banks as well. Indeed, after this introduction of the banking system, it becomes extremely difficult to discern the remaining significance of the coupon system. Because in Roemer's second representation of market socialism, the coupon market cannot be used to raise capital, its influence on firms' decisions must be negligible. All it might do to affect resource allocation would be to inform the loan-giving banks about the current bets of coupon holders. Roemer, however, does not seem to give much credit even to this informational role of his own system. Eventually, he is led to "recommend safeguards that enabled banks to monitor firms independently of what the stock market is saying" (82).

The Banking System and Central Investment Planning: A Third Approach

The relevance of the coupon system having been superseded by that of the banking system, Roemer (in chaps. 11 and 12) introduces the state as a new player. This shift further reduces the role of the coupon market and brings into question the independence of banking system. Now, we learn that the state would be "engaging in investment planning, both by providing incentives for firms to invest in particular sectors or regions and by direct government investment" (90). As we shall see later, interest rates are manipulated in order to encourage particular investments against the signals of the market. More and more, the meaning of *market* socialism loses its connection to markets and returns to its traditional focus: state intervention.

In addition, Roemer's arguments lose coherence. The role attributed to central investment planning now supersedes the "provisions that grant the banks considerable independence from state control" (76).[13] Roemer asks the right question: "But why should the bank, which is itself a publicly owned institution, perform its monitoring job well?... The principal question is whether the banks would operate with sufficient independence of the state, making decisions about firms using economic and not political criteria" (76). The principal answer given, however, is not that firms and independent banks should be primarily responsible for investment decisions (the coupon holder having long since been dispensed with). Now, government agencies using political rather than economic criteria make investment decisions! All this adds up to an enormous confusion for the reader, who can never be quite sure just who is really in charge of financing and investment decisions.

13. His proposals once more contradict themselves: there should be "constitutional ...guarantees that bank management be evaluated on economic criteria only," while at the same time bank management "should be elected by citizens in the bank's district" (76ff.)!

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To summarize, all we know for sure is that Roemer's market socialism has no stock market for trading transferable ownership titles. Coupons represent entitlements to firms' profits but they, at least in later versions of the model, can neither be emitted by firms in order to raise capital nor be bought and sold by citizens in order to accumulate or liquidate assets. Although coupons are first (chap. 8) described as the central property of market socialism, yielding massive welfare gains, it becomes clear later that neither firms' managers nor loan-giving banks should take the coupon market seriously. This revision brings to the fore a banking system that should now do the monitoring and financing of firms (chap. 9) using purely economic criteria. Soon, however, we are confronted with a second revision calling for governmental investment planning (chap. 12), which supersedes the banking system that, in turn, dominates the coupon system.

What Roemer Wants Socialists to Want

Roemer's model of market socialism ought to be judged by the ends he himself proclaims. His normative frame of reference remains, however, as ambiguous as his institutional proposals. Roemer describes the socialist creed as follows: "I believe socialists want equality of opportunity for: (1) self-realization and welfare, (2) political influence, and (3) social status" (11).

Stressing equality of *opportunity* rather than social *outcomes*, the classical liberal might agree with Roemer, while clarifying the concept by emphasizing the need for rules to protect equal rights to pursue individual ends ("self-realization and welfare") in market transactions and to allow competitive market entry of outsiders. Adoption of such rules would be possible if the unequal opportunity of exercising "political influence" in rent-seeking societies were discouraged by a strict rule of law. A constitution of equal rights would restrict preferential treatment of powerful groups, defending equal opportunity in markets against the cementing of a given "social status."

Roemer, of course, defines equal opportunity not in terms of individual rights against interference from the state or from fellow citizens but in terms of social claims on support from the state (i.e., claims on the money of other citizens). Equal access to equal rights is disparagingly said to "only touch the surface of a much larger task. Equality of opportunity requires special compensation or subsidy for those denied access to privilege. Most generally, equality of opportunity requires that people be compensated for handicaps induced by factors over which they have no control" (12).

Roemer neglects the legal and politicoeconomic consequences of his egalitarian precepts, consequences that were at the heart of Hayek's critique of socialism following the calculation debate (beginning with his *Road to*

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Serfdom [1944], extensively discussed in his *Mirage of Social Justice* [1976] and ending with his *Fatal Conceit* [1988]). Briefly put, the Hayekian objection would be that equality under the law is not associated with Roemer's notion of equality of opportunity; rather, pursuit of the latter must seriously damage the former. The general rule of law cannot serve as a "surface" to legally enforced special compensations on grounds of redistributive justice. It would be increasingly destroyed by privileges granted to powerful interests who call for compensation of market outcomes that are, indeed, induced by factors over which no one has control. If the political system is given unspecified (and hence unrestricted) control over market results, there would be "a future for socialism," even in its totalitarian variants. In the same measure, however, there would be no future for the rule of law and its economic counterpart: dynamic market competition.

To be sure, I do not accuse Roemer of paving the "Road to Serfdom." There can be, and there actually are, at least viable *compromises* between equal individual liberty under the rule of law and equalized social status under the will of government. However, the compromises of conflicting values should be described as such. Unspecified rights to government compensation for alleged handicaps of special groups cannot be simply brushed under a "surface" of rights against state interference. My argument is not about the superiority of values as such; it is about the opportunity costs of pursuing clouded objectives such as distributive justice in view of their institutional consequences. These arise primarily on a constitutional level, describing the relationship between government and the individual, and critically affect the workings of a competitive order.

Paternalistically Forced Savings and Equal Nonopportunities

Roemer's socialist state distributes an equal amount of coupons or stock vouchers to every adult citizen. The government's "gift" represents a claim on national wealth,[14] but its disposition is seriously constrained. Individual coupon holders cannot dispose of their assets as freely as capitalist stockholders can. They cannot reduce their coupon holdings in favor of what they believe to be more profitable investments (in foreign stock, bonds, human capital, own business ventures) or more urgent needs (a honeymoon, a house, a car, a conference on market socialism). Socialist "investors" cannot liquidate, transfer, or bequeath their claims in accordance with their individual propensity to consume, risk preference, and time preference. For the

14. This may be illustrated by imagining the transition from a capitalist to a coupon system: all former owners, shareholders, and partners must be expropriated or paid off.

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sake of "equal opportunities," in the sense of an equal distribution of dividends, Roemer's "rich" as well as his (95 percent) "poor" are deprived of the opportunity to pursue their own individual ends by freely disposing of their coupon budget.

For Roemer (73f.), starting with an equal distribution of *transferable* shares would not do; one has "to prevent the poor from selling *prematurely* to the rich...this phenomenon could happen...if the poor had poorer information than the rich." This view not only brings to light a blatant paternalism. It also contradicts the assertion that a coupon economy would make use of the same quality of actors' knowledge and skill as does a capitalist stock market. What can we expect of a "market" composed of actors who are forced to take part, who are described as having inferior information, and who are not even trusted to make mature decisions?

In Roemer's coupon economy all have to invest their fixed coupons' share whether they are informed, interested, and skilled in such affairs or not. Such involuntary "market participation" cannot match the spontaneous division of labor, knowledge, risks, and skills that follows from a voluntary participation of those who have a specific interest and experience in speculating on the future performance of firms. A real stock market "makes possible, whether in the form of 'take-over bids' or otherwise, the transfer of the control of material resources from pessimists to optimists, i.e. to those who believe they can make better use of them than others can" (Lachmann [1969] 1977, 162). A coupon lacks these properties. Because exit from and additional entry into the coupon market is outlawed, those with "poor" information or willingness to speculate must stay put along with those who want to bear risks and incur information costs. In this publicly organized "stock-exchange game" the stakes are paid by "the state" and can be neither lowered nor increased by the players. With no chance to win or lose much more than the average from the allocation of given coupons, no one has a great incentive to invest in information and monitoring. Abolishing the opportunity to accumulate and transfer capital also obstructs the accumulation of knowledge and diversification of risk (Alchian [1965] 1977, 140ff.).

From the firms' perspective, a coupon "market" bears almost no resemblance to a capital market, simply because there is no capital to be raised. No supply-and-demand relationship connects firms and coupon holders. Unlike managers in capitalist systems, Roemer's managers face no pecuniary external effects if citizens change their portfolio, nor are they confronted with the risk of takeover. Consequently, one is at a loss to understand why "the coupon stock market should provide the same discipline over firm management as a capitalist stock market" (50). The revisions of the concept that Roemer adds later in his book indicate that he himself envisages the coupon economy as not much more than a coercive transfer mechanism with some

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gambling properties for the receivers. In considering the "efficiency of firms under market socialism" (chap. 9) we must, as Roemer does, concentrate on the workings of the banking system.

Cartelizing the Economy: The Banking System

Whereas the coupon system is characterized by an excessively high dispersion of involuntary "market" participation (for the sake of equalized profit distribution), the other basic functions of a capital market (financing and monitoring) are assigned to a banking system with excessive concentration. Roemer's reliance on "a fairly small number of main banks" (76) entails a concentration of capital supply and monitoring capacity that exceeds by far that of any capitalist stock market and is exceeded only by the workings of a CPB. In capitalist systems that rely on a combination of financing via asset markets and competing private banks, we can expect the number and competitiveness of sources for risky investment funds to be higher. The same is true for the sources of independent information acquisition. In Roemer's market socialism, capital can be raised only via bargaining with the one main bank in charge of a given group of firms. Under this regime, competition on capital markets *and* on product markets is likely to give way to a producers' cartel organized around its leading bank. If firms form a group financed by one and the same bank, the bank has the incentive not only to monitor but also to coordinate the operations of the firms in its group. It would be ill advised to have the investments of one of its clients threatened by competitive attacks from others. This incentive to collude holds against competition from the members within the group as well as from newcomers and foreigners. These often criticized tendencies of the Japanese *keiretsu* (e.g., Lawrence 1991) become systematic features of Roemer's market socialism.

Obstructing Competition I: New Firms

How does "the man with the new idea" enter the socialist market? Is there an equal "opportunity for anybody who knows a cheaper method to come at his own risk and attract customers by underbidding the other producers" (Hayek ([1940] 1994, 247)? We must expect that in Roemer's coupon and banking system, innovative entry to markets confronts problems similar to those arising in Lange's model of a price-fixing CPB. Any new firm must eventually be integrated into the coupon system and into the *keiretsu*-like financing group; it cannot rely on the raising of private capital by issuing shares; it cannot at the same time be owned by profit-sharing associates and be integrated into the coupon system. Indeed, why should an entrepreneur start a risky venture at all if losses fall back on him privately whereas profits are "owned" publicly?

Roemer recognizes that eventually he must allow a private sector in

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order to "provide almost the same incentives that exist in capitalism for those who form new firms in order to bring innovations to market" (78f.). But the existence of even "almost" equal opportunities and incentives for innovators must be seriously doubted. In his proposal "it is envisaged that many growing firms would eventually be bought by large firms in the 'public' sector" (78),[15] If this acquisition does not occur voluntarily, "the government might auction the private firm to firms in the public (coupon) sector" (78). Even if "the proceeds [are] going to the erstwhile owner" (78), however, entrepreneurial pioneers are treated badly: as soon as they become successful and competitive, they are forced out of the market. Is it far fetched to expect that "the man with the new idea," with entrepreneurial spirit and pride, would try his luck abroad, in real capitalist countries that offer him an equal opportunity to exploit his knowledge without being forced to accept a "golden handshake" from incumbent competitors?

Roemer's public sector is deliberately designed to frustrate the emergence of private ventures right from the beginning: "Perhaps joining the public sector would be a prerequisite to receiving loans from the main banks or loans at preferential interest rates. There would be a statute requiring nationalization of private firms that reach a given size" (78).

Obviously, "the man with the new idea will have no possibility of establishing himself by undercutting" (Hayek [1940] 1994, 247). Whereas in Lange's system "every calculation by an outsider who believes that he can do better will have to be examined and approved by the authority" (247), in Roemer's system every request for loans by an outsider has to be addressed to banking consortia that either discourage or absorb new competitors who threaten the insiders (e.g., in their ability to repay loans). We must conclude that Roemer's praise of market competition is muted as soon as it encounters the hard necessities of his market socialism. There is a protective belt around the socialist market cartel; there cannot be equal opportunity for new ventures and incumbent firms.

Obstructing Competition II: International Capital Flows

Referring to international capital flows, Roemer asks: "Would domestic firms attempt to set up foreign subsidiaries to escape high wages at home?" (82). Of course they would like to invest abroad—and for many more reasons than high wages at home. One possible reason would be to escape socialist mar-

15. Roemer adds: "as happens under capitalism." We are puzzled to find that the alleged empirical tendencies toward "monopoly capitalism" (Sweezy 1966) that used to be at the heart of Marxist critiques of the market now serve as a normative recipe for market socialism. Is this considered "shortening the labor pains of a coming communism"? We don't believe this is what Roemer intends; but we conclude that competition is not perceived as a procedure of eminent importance.

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kets designed by Roemer to frustrate successful private profit-seekers. In addition, firms prevented from taking full advantage of the international division of labor, capital, and knowledge could hardly succeed in modern global markets. Such impediments, however, do characterize Roemer's market socialism: "This is an important sense in which the firms of the market-socialist economy would remain socially controlled: they would not necessarily have the right freely to export capital" (82).[16] Roemer welcomes some foreign investment in domestic firms at least within the boundaries "circumscribed by law." Foreign private capital, however, cannot be integrated into the coupon system, as it would bring in real money. Hence, "the possibility arises that citizens might use foreign firms as their agents to invest their capital in domestic firms. This would have to be outlawed" (82). Thus, the government interferes with international capital flows in a way that discriminates against individuals kept within their market-socialist system. There must be a protective belt around the market-socialist economy; there cannot be equal opportunity for domestic and foreign market participants.

Obstructing Competition III: Investment Planning

The case against equal opportunities (and risks) for market participants to enter and exit the market according to general rules of the game is further strengthened by Roemer in his digressions on state intervention and investment planning (chaps. 11, 12). Here one can most directly observe a "pretense of knowledge" (Hayek [1975] 1978b) flowing from an attitude with deep roots in mainstream economics. According to Roemer, "the essential element that causes investment to be often inefficient in market economies [is] the fact that it takes time in an uncertain world" (91).

I shall not consider here the interesting methodological question of how to characterize states of (in)efficiency while at the same time taking into account that investment takes place in an ever-changing, complex, and inherently uncertain world.[17] Instead, I ask: How are nonmarket arrangements supposed to cope better with an uncertain world? Roemer presents two mechanisms aimed at socializing entrepreneurial risks through government intervention.

16. See also (113): "With public bank directors popularly elected and legal provisions limiting the freedom of firms to export capital, the 'structural power of capital' over society as a whole would be broken. Those who control capital would not be able to hold society hostage by threatening to take the means of production (and the jobs that go with it) overseas." The opportunity costs (and the jobs that go with it) that arise if firms cannot seek the best uses of resources outside a reservationlike market socialism are totally ignored.

17 This problem has often been raised by Hayek (see, e.g., [1968] 1978): "If we do not know the facts we hope to discover by the means of competition, we can never ascertain how effective it has been in discovering those facts that might be discovered" (180).

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The first proposal (chap. 11) is that the government should promise *(ex ante)* to subsidize *(ex post)* those investments that fail because of "bad shocks for which the firm is clearly not responsible, such as a recession of the economy" (92). This procedure should increase the propensity to invest, regardless of the individual "firms' pessimistic estimates concerning the future" (93). Such promises are usually not provided by private insurance agencies, because "significant 'moral hazard,' the possibility that the insured will take fewer precautions against a bad because he is insured, may be involved" (92). The same, of course, is true for the kind of contingent public subsidizing advocated by Roemer. The government, however, is trusted to be able to distinguish clearly between a firm's bad management and its "bad luck." Like Lange's CPB, Roemer's central investment-subsidizing bureau would have to imitate entrepreneurial calculi "on much the same scale as if it were actually running the enterprise" (Hayek [1940] 1994, 251).[18] By its very assignment, however, the bureau must honor political judgments about where resources should go, and hence it must encourage investments at times and in areas that private agents would avoid. Subsidizing investments contrary to individuals' independent "estimates concerning the future" is a very costly procedure. It opens the gates for all aspects of rent seeking, using taxpayers' money to encourage firms to act in opposition to market signals. Although entrepreneurs' risks are alleviated, they become concentrated on the political level, where we expect to find highly unequal opportunities to soften one's budget constraint. Kornai's warnings do not seem to have impressed Roemer deeply.

Similar deficiencies beset Roemer's second proposal for investment planning (chap. 12). To make things worse, it takes the form of a relapse into fallacies of third-generation market socialism. Once again we are presented a "Lange equilibrium" as the market-socialist counterpart of a capitalist "Walrasian equilibrium." Both rely on assumptions of perfect information and foresight of maximizing individuals and a static state of perfect competition (97f., 100f.). Neither therefore accommodates the fact that investment takes time in an uncertain world.[19] Nevertheless, far-reaching

18. The controlling problems resemble those of Lange's CPB also in the following aspects: "From the point of view of the manager it will be much more important that he should always be able to prove that in the light of the knowledge which he possessed the decision actually taken was the right one than that he should prove to be right in the end. If this will not lead to the worst forms of bureaucracy, I do not know what will" (Hayek [1940] 1994, 248).

19. Roemer argues: "Just as one assumes that the market finds the Walrasian equilibrium in a capitalist economy, so we assume that the market will find, after the Government's announcement, this Lange equilibrium in the market-socialist economy. One assumption is as robust as the other" (102f.). However, comparing one nirvana with another is of no help either for identifying real-life problems of investments under genuine uncertainty or for comparing the properties of real-life institutions for coping with such problems.

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conclusions are drawn. Roemer distinguishes the Lange equilibrium from the capitalist one by a more equal distribution of profits (attained through the coupon market) and a centrally "proposed level and pattern of investment for the economy" (99f.). The desired regional or sectoral patterns of investment are to result from "a democratic process that elects a party that is empowered to implement its economic program" (99). The instruments of investment planning are "discounts and surcharges on the market interest rate" (100). As all investments are financed by loans, interest-rate manipulations are a powerful instrument for guiding investments. Prices for loans are now varied according to political considerations, regardless of the amount of voluntary savings in the economy.

The whole process of structural change—the innovation-spurring entry of firms into old and new markets as well as the exit of firms that no longer meet the market test—is now subject to political guidance. Loans are granted according to political considerations (picking the winners, protecting the losers), deliberately ignoring the market signals of competitive markets. At the same time, interest rates no longer serve as meaningful signals of the opportunity costs of consumers (time preferences and risk preferences) but rather as indicators of the political opportunities for rent seeking. Once more, "competition as a discovery procedure" (Hayek [1968] 1978a) is replaced by intervention as a discriminatory procedure. Therefore, one cannot believe that "Kornai's and Hayek's point has been accepted, that as long as the government cannot credibly commit itself to noninterference in the competitive process, managers will not be profit-maximizers and economic inefficiency will result" (34).[20] There is an interventionist core in the market-socialist economy; there cannot be equal opportunity for organized and unorganized market participants.

Conclusion

What is to be gained from continuing an intellectual debate on socialist economics that has now grown older than most socialist economies? Considering Roemer's lines of reasoning, one is inclined to say: "very little." However, taking up the intellectual challenge of market socialists remains of considerable value for the adequate analysis of *capitalist* systems for at least one reason: the meanings and, perhaps, the virtues of certain capitalist

20. Hayek's point against central (investment) planning is probably more adequately stated along the following lines: "If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to them" (Hayek 1945, 524). See also Streit (1995) for a Hayekian critique of modern industrial policy.

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institutions might well be clarified. Mises ([1949] 1966, 703) made a similar assessment of the old calculation debate, arguing that "such examination offers a good opportunity to bring into relief fundamental features both of the market economy and of the imaginary construction of a nonmarket society." Indeed, we best appreciate what we have when we imagine it lost. Ultimately, Roemer's book is very helpful in substantiating an old Austrian view:

> that it is hardly an exaggeration to say that without a Stock Exchange there can be no market economy. What really distinguishes the latter from a socialist economy is not the size of the "private sector of the economy," but the ability of the individual freely to buy and sell shares in the material resources of production. Their inability to exercise their ingenuity in this respect is perhaps the most important disability suffered by the citizens of socialist societies. (Lachmann [1969] 1977, 161).

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South African Economic Development *in the Light of the New Institutional Economics*

HENRY KENNEY

The importance of institutions in shaping economic development is now widely acknowledged. Institutions matter because they affect incentives. The institutional framework of a society determines the degree to which its members will pursue wealth-creating activities. But the historical record shows that effective—that is, growth-promoting—institutions have been the exception and not the rule. In the nineteenth century, relatively few countries achieved sustained economic growth. Britain, the United States, France, Germany, and Japan come to mind. More recently, the East Asian highfliers—South Korea, Taiwan, Hong Kong, and Singapore—have grown impressively. But a country can achieve sustained growth and then lose momentum, lapsing into stagnation and even decline. Argentina is perhaps the classic example. Economic growth is hard to come by and easy to forfeit.

The new institutional economics has given us a way to understand why economic development does not come easy. This type of analysis began with Ronald Coase's insight that when exchange is costly, institutions make a difference (1960). In a world of zero transaction costs, institutions do not matter. Any assignment of well-defined and enforced property rights will result in an efficient outcome because different parties will have an incentive to bargain with one another to capture the gains from trade. The property

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rights will ultimately be held by the party who can make the most profitable use of them. Neoclassical economic explanations are all we need, as Douglass North expresses it, "because the competitive structure of efficient markets leads the parties to arrive costlessly at the solution that maximizes aggregate income regardless of the initial institutional arrangements" (1990, 15).

Of course, transaction costs are usually positive, because information is costly. Goods and services have attributes that often are not immediately obvious. Buying a used car is a familiar example. Finding out about these attributes requires an investment in searching for information. Then comes the problem of enforcement, for "without institutional constraints, self-interested behavior will foreclose complex exchange, because of the uncertainty that the other party will find it in his or her interest to live up to the agreement" (North 1990, 33). Measurement and enforcement together determine the costs of transacting.

When it is costly to transact, institutions come into their own. Institutions are "the humanly devised constraints that structure political, economic and social interaction." (North 1991, 97). They consist of both formal constraints such as constitutions, laws, and property rights, and informal constraints such as customs and codes of conduct. According to North, "Institutions provide the incentive structure of an economy; as that structure evolves, it shapes the direction of economic change towards growth, stagnation or decline" (97). Effective institutions create an economic environment that encourages greater productivity.

North has devoted most of his academic career to applying the Coasean analysis to economic history. As he has pointed out,

> economic history is overwhelmingly a story of economies that failed to produce a set of economic rules of the game (with enforcement) that induce sustained growth. The central issue of economic history and of economic development is to account for the evolution of political and economic institutions that create an economic environment that induces increasing productivity. (1991, 98)

North distinguishes three general types of exchange. The type most common in the past has been "personalized exchange involving small-scale production and local trade" (1990, 34). Here the costs of transacting are low because the trading parties engage in repeat dealings among themselves, they are few in number, and they are well informed about one another. By the same token, production costs are high because there is little scope for specialization and division of labor. Personalized exchange entails limited markets and does not lead to sustained growth.

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Under the second general pattern of exchange, the prospects of gains from trade improve substantially. This involves impersonal exchange where "the parties are constrained by kinship ties, bonding, exchanging hostages, or merchant codes of conduct" (1990, 34–5). But as production costs decline, transaction costs go up. As exchange extends far beyond the face-to-face dealings of a few parties who know one another well, the problem of cooperation has to be handled in different ways, hence such new institutional devices as merchant codes of conduct and the exchange of hostages. The state may also play a more prominent role, as in early modern Europe, where the protection of merchants brought with it clear prospects of revenue gains for the public guardian. "However," states North, "in this environment the role of the state was at best ambiguous, because the state was as often an increasing source of insecurity and higher transaction costs as it was protector and enforcer of property rights" (1990, 35).

A third form of exchange, impersonal exchange with third-party enforcement, has been crucial for modern economic growth. Here the increasing role of the state was essential to the emergence of advanced economies. As societies became more complex, monitoring based on frequent personal contact within small groups became less common, and the returns rose on "opportunism, cheating and shirking." A coercive third party was essential if growth was to take place. North (1991) asserts that "Historically the growth of economies has occurred within the institutional framework of well developed coercive polities. We do not observe political anarchy in high-income countries. On the other hand the coercive power of the state has been employed throughout history in ways that have been inimicable to economic growth" (14).

Even in the most economically developed countries the state has interfered obtrusively to favor interest groups with relative bargaining strength. Tariff protection, subsidies, and tax exemptions have proliferated in advanced Western countries. When the state is present, redistribution cannot be avoided. But the institutional mix still provided enough incentives for activities that resulted in net productivity gains and thereby created wealthy societies.

The obvious question is: How do such efficient institutions emerge? The answer is not obvious. North has questioned the standard public-choice portrayal of the role of the state as merely responding to the rent-seeking pressures of interest groups and lobbies. As he puts it: "It is no accident that economic models of the polity developed in the public choice literature make the state into something like the Mafia—or, to employ its terminology, a leviathan. The state becomes nothing more than a machine to redistribute wealth and income" (1990, 140). Yet if it is a Leviathan, it is a relatively passive one. It represents the largest concentration of power in

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society, but is at the same time subject to the pressures of the dominant political and economic groups.

North argues that we must look beyond the struggle for redistribution. The informal constraints such as customs, traditions, and codes of conduct give rise to ideologies: the subjective interpretations by which individuals impose coherence on their perceptions of the social world. Ideology modifies narrow maximizing behavior. Ideology economizes on the information costs and thereby helps individuals deal with the external world. North notes that "It is simply impossible to make sense out of history (or contemporary economies) without recognizing the central role that subjective preferences play in the context of formal institutional constraints that enable us to express our convictions at zero or very little cost. Ideas, organized ideologies, and even religious zealotry play major roles in shaping societies and economies" (1990, 43–44).

An obvious example of the role of informal constraints, to which North often refers, is the different fates of federal constitutions in the United States and Spanish America. Federalism worked in North America, arguably because of patterns of decentralized government and control that already existed in the colonial period. In Spanish America it soon collapsed as the centralist bureaucratic structure and tradition of the colonial centuries asserted themselves. Constitutional forms as such were not decisive. What mattered was that the inhabitants of the United States were already a free people when the Constitution was created in 1787, whereas the peoples of Spanish America had never experienced self-government when colonial rule collapsed early in the nineteenth century. Ultimately, the development of the two regions of the Americas reflected the whole preceding course of English and Spanish history, respectively.

South Africa before the Mineral Revolution

The economic development of South Africa has had a variety of rather special features, reflected in institutions that have attracted wide comment. Writing in 1938, S. H. Frankel observed of the sector of the economy mainly responsible for the country's growth: "The creation of the present European economy in South Africa possibly owes as much to the surplus wealth resulting from the peculiar organization which it has been able to adopt in exploiting its mineral deposits, as to the favourable climatic conditions which distinguish it from the northern territories" (13). And, in a wider context, "African economic development is governed by numerous monopolistic and sectional interests, by particular fiscal policies and by exceptional social techniques and institutions. Diverse politico-economic policies have in the past influenced, and continue to affect, the flow of resources" (15).

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Western capitalism arrived in South Africa in a paradoxical form. For a century and a half after 1652, colonization brought about little economic development. Yet the occupying power, the Dutch East India Company, was the largest and most advanced capitalist institution of the time. Having ousted the Portuguese as the dominant power in the Spice Islands, it had proceeded to make huge profits through the single-minded and unsentimental pursuit of material gain, even waging war on its economic rivals in Asia. But the company's decision to occupy the Cape had little to do with any prospects of wealth to be extracted from that region. The company viewed its settlement at the Cape simply as a refreshment station for its ships returning from the East.

Conditions at the Cape did not favor economic development. Apart from the strategic location of the Cape peninsula, contemporaries found little to attract them. Beyond the peninsula itself and the immediately adjacent areas, rainfall was scant. The most promising economic activity appeared to be extensive stock farming. Attempts at movement inland from the Cape peninsula met with formidable obstacles. By 1700, only about 1,200 Europeans inhabited the Cape Colony. The place was a backwater.

The company compounded the economic disadvantages of the Cape by the policies it pursued throughout its period of rule, from 1652 to 1795. Arnold Plant speaks of "the warping effect on development of rigid monopolistic institutions under the Company which prevented the prompt and full adjustment of enterprise and resources to changing conditions" (quoted in Frankel 1938, 42). At first sight this situation presents a paradox: one of the great capitalist institutions of the day pursuing policies seemingly designed to make growth impossible. But the puzzle is only apparent. The company had no interest in the Cape's economic development, which was hardly surprising in view of its reasons for occupying the Cape. Its autocratic rule and its monopolistic policies offered little incentive for permanent settlement by enterprising immigrants from Europe. In fact, the company's reputation as an employer, wherever it ruled, was so bad that it had to recruit its servants largely from the less-prepossessing elements of Dutch and other urban societies. Europeans not employed by the company made the best of the limited opportunities available, most opting for stock farming. Land was the one abundant factor of production. During the eighteenth and early nineteenth centuries, trekboers moved into the dry interior, largely isolated from the limited Cape market, carrying on what was close to a subsistence economy and impervious to official attempts to limit the process of diffusion.

The institutional structure the company chose to impose at the Cape had one logical consequence: the introduction of slavery. Historians do not always see this connection. They tend to regard slavery as, in the words of

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South Africa's most brilliant historian, developing "by circumstance rather than by necessity" (de Kiewiet 1941, 21). C. W. de Kiewiet's explanation is that "For want of great staples and intensive use of the soil a true slave economy, like that of the sugar islands, could not develop. There were few compelling reasons and no climatic reasons why the Dutch and the Huguenots could not have remained a truly white society."

Afrikaner historians have embroidered on this tale, lamenting that in an avoidable fit of self-indulgence the company decided to base the colonial economy on an enslaved nonwhite labor force. After all, slavery was nothing new in the rest of its colonial empire. But from this decision, the argument goes, there was no turning back. At an early stage the white population of South Africa got hooked on the comforts of having the menial work done by nonwhites, with frightful consequences for the future. Had whites not come to accept the notion that certain kinds of work were incompatible with their self-respect, the whole course of South African history would have been different.

The most that can be said for this argument is that it is dramatically apocalyptic. It has entertainment value, but little more. Even de Kiewiet's restrained formulation does not consider the powerful incentive to introduce slavery that the institutions of company rule provided. The settlement had a labor problem; it could not be solved by the undisciplined and inefficient workers who found themselves, often without their own consent, at the Cape. The indigenous inhabitants of the Cape, the Khoi and the San, were slow to grasp the uplifting nature of wage labor. Nor could they readily be enslaved, for the cost of tracking down runaways would have been immense. For these compelling reasons, the company began to import slaves in 1658.

Slavery at the Cape never played the role it did in the antebellum South of the United States. It was not crucial to what was in any event a fairly stagnant economy, nor was it the foundation of a whole way of life dominated by substantial slaveholders. When company rule ended, slavery was the dominant form of labor only in the fertile southwestern part of the colony. Wine and grain farms in no way resembled Southern plantations. Most of them employed only ten to twenty slaves. Many slaves worked outside agriculture, employed in Cape Town as domestic workers, craftsmen, and laborers. As an institution, slavery in South Africa reached its limits very soon and showed none of the economic dynamism and expansionist thrust that so disturbed American abolitionists before 1860.

Yet in another sense it had remarkable staying power. Summarizing the experience of both the South and the Cape, the American historian George Fredrickson (1981) has written:

> More than any other single factor, it established a presumption that whites were naturally masters and members of a privileged

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> group while nonwhites were meant to be their servants and social inferiors. Problems of group definition, arising from race mixture, remained to be worked out or clarified, and more elaborate and self-conscious rationalizations for white dominance emerged in response to the new intellectual trends and political developments of the nineteenth century. But a slaveholding mentality remained the wellspring of white supremacist thought and action long after the institution that originally sustained it had been relegated to the dustbin of history. (93)

Fredrickson probably exaggerates when he talks about "a slave mentality" in South Africa. It would be more appropriate to argue that, for a number of reasons, white supremacist attitudes became deeply rooted among European settlers in South Africa. This view comports with North's emphasis on the informal constraints that condition behavior. They derive from the subjective appraisals of the world that individuals inevitably have to make. If substantial groups share the same perceptions and feel strongly about them, they can serve as a powerful basis for collective action, a means of overcoming the free-rider problem. In South Africa we can readily identify how perceptions filtered through a white supremacist worldview encouraged certain kinds of group cohesion.

The monopolistic ways of the Dutch East India Company did not otherwise crucially shape the economic development of the Cape. Few opportunities for growth existed; the trekboers adapted themselves to the factor proportions by expanding territorially, utilizing the abundant land. Their movement was a natural trend, encouraged by the lack of incentive given them by the company to stay near Cape Town and farm for the local market.

As pastoralists with few links to the market economy of the Cape, the trekboers were hardly subject to the decrees of a government that attempted to control the process of expansion. Their labor relations resembled the white supremacy embodied in the slavery of the southwestern Cape. The structure of Khoi society had disintegrated in the face of European expansion. As the Khoi suffered demographic disaster and displacement from their land, they increasingly entered into the service of the trekboers. The trekboer economy was a semisubsistence way of life, adapted to an environment that appeared invincibly hostile to any form of economic progress.

When the British finally took over the Cape in 1806, they brought with them institutions that laid the foundations for future economic growth. The form of government remained autocratic, but the British were the pioneers of the early industrial revolution. Britain's rulers, post–Adam Smithians, were much less committed to monopolistic trade policies than their Dutch predecessors. They were happy as long as the Cape paid its own way. Controlling the sea lanes to protect the passage to India was their main interest.

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But the British also maintained order. They introduced reforms that served notice that justice would be administered in a more evenhanded manner. Ordinance 50 of 1828, which permitted colored persons to move freely without passes, has its own special place in the hall of infamy of Afrikaner nationalist historians. The slaves were emancipated in 1834. Civil magistrates and qualified judges were appointed.

On the frontier in the Eastern Cape, British efforts to establish the rule of law were not appreciated. By the 1820s, white frontiersmen and black pastoralists had long been engaged in conflict over the common scarce resource of fertile soil. Attempts to occupy the same lands led to an intensification of all forms of economic contact. As historians have often pointed out, the economic similarities between whites and blacks on the frontier were greater than their differences. But many of the Boers in the Eastern Cape did not like what they saw as the ultraliberal policies of a British administration that gave excessive protection to blacks. The costs of asserting and enforcing their claims to disputed territory rose. The backlash, which took the form of the Great Trek in 1836, was one of the two watersheds of South African history in the nineteenth century.

The flight of the Boers into the interior led to a change in the political structure of South Africa. It also resulted in a major realignment of property rights. Those with superior military power were the winners. Their triumph was reflected in institutions that made possible an economic development both substantial and singularly costly to those with little bargaining strength.

The establishment of state power was a necessary but not a sufficient condition for economic development in South Africa. The Boer republics that arose on the High Veld at first appeared even more economically retrogressive than the Cape under company rule. They were, after all, hardly more than

> a scattered community of farmers who...required very little administrative machinery, and preferred a minimum of government. It was literally true, as they said, that all they asked was to be left to themselves. Co-operation, even with one another, was limited to joint action against any disturber of their peace. (Macmillan 1949, 117)

Before the discovery of diamonds and gold, economic development remained confined largely to the Cape Colony. It took place within an institutional framework of government-maintained order and low taxes. There was economic progress, based on wool exports and arable production for the limited market at the Cape. However, the rate of capital formation was low and depended on the state of agriculture. Investment in roads rose markedly

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in the 1840s, but the construction of a railway network had to wait for the mineral revolution to make it viable. Even then the colonial government financed it by raising loans in London. The Cape economy seemed to be doing about as well as it could, given the resource constraints under which it operated.

One of the most publicized features of nineteenth-century history was what Frankel (1938) called "the relentless process of appropriating extensive areas of native land" (45). A major cause of the Great Trek had been the prospect of acquiring huge tracts of empty land outside the Cape colony. Yet the trekkers were ill informed: the country they entered was not as empty as they had supposed. The rise of the Zulu kingdom in the east had resulted in substantial depopulation and dispersion of smaller tribes in Natal. In the Transvaal the rise of the Matabele had produced similar effects. After the occupation of these regions by white settlers and the establishment of some semblance of law and order, Africans began to return. Their numbers increased markedly. Virtually from the beginning the settlers found themselves intermingled with blacks who vastly outnumbered them.

The property rights of the returning Africans were poorly specified. The problem arose not just because their previous displacement made it difficult for them to assert original claims to the land. Their system of communal land tenure differed from the private ownership of the whites. Hence, negotiations over the transfer of property from blacks to whites usually came to naught. Chiefs who were supposed to represent their people in such negotiations could not constrain dissidents. In the end, the absence of well-defined property rights meant that peaceful negotiation proved impossible. The superior might of the governments of the Boer republics and the British colonies of Natal and the Cape proved the ultimate arbiter in resolving disputes about the land.

The Cape was the main beneficiary of British colonial rule. By 1910 some progress had been made in assimilating nonwhites to Victorian institutions. In the Boer republics, of course, such considerations did not apply. In the other British colony, Natal, the preponderance of Africans was so huge that the white colonists did not even contemplate the limited political democracy of the Cape Colony. In all the political units of nineteenth-century South Africa, the need to maintain white control meant that decentralized, pluralistic institutions applied, at most, to individuals of European descent.

De Kiewiet (1941) provides a graphic summary:

> Between the native policies of the British colonies and the Dutch republics no very significant distinction can be drawn. In all of them the process which allotted the privilege of land to the Europeans and the duty of labour to the natives was similar. In the new

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> society which was being created the possession of land was a badge, and dispossession was a stigma. The endowment of the whites and the disendowment of blacks obeyed the social and moral rules to which the ruling group was attached. (75–76)

The different governments of South Africa attempted a judicious blend of policies, which persisted up to the end of apartheid. The one objective was an adequate supply of black labor; the other was the survival of traditional institutions on a territorially separate basis.

Black Farmers and the Market

The process of colonial expansion had greatly extended the market for all products, especially for agricultural and pastoral ones. Africans had been quick to take advantage of the new opportunities. The emergence and later decline of a class of black capitalist farmers in Southern Africa has been one of the favorite themes of radical historians since the late 1970s. One of these writers, Colin Bundy, has documented "The Emergence and Decline of an African Peasantry" (1972) between 1870 and 1913. The growth of a colonial economy was initially accompanied by a highly positive African response to trade opportunities in all four provinces, particularly between 1870 and 1886. Increasingly, however, in the next quarter-century African commercial farming declined. As Bundy sees it, "The decline in productivity and profitability of African agriculture—and the corollary of greater dependence by Africans on wage labour—is in an important sense the outcome of the nature of capitalist development in South Africa" (371).

In particular, Bundy regards the postmineral period as one marked by the preponderant influence of white capitalists and farmers. Mineowners demanded and obtained laws, such as poll taxes, that put pressure on rural Africans to provide them with cheap labor. White farmers, nervous about competition in the marketplace from enterprising black peasants, put pressure on politicians for laws favorable to themselves and damaging to their competitors. Railways linked white agricultural areas to the ports and urban markets. Squatters' laws, culminating in the Natives Land Act of 1913, were designed to prevent Africans in "white" areas from being there in any capacity but that of laborers.

All this may be true, but it hardly follows that prospering African farmers were in some way harmed by inexorable processes of capitalist accumulation. Undoubtedly, influential white interest groups used their political clout to shape the rules of the game in ways that favored themselves at the expense of Africans. But in another sense, the institutional framework did not require the exercise of white political power to place black farmers at a disadvantage. The survival of communal tenure and the consequent blunting

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of individual incentives to raise incomes from land use were powerful causes of continued African economic backwardness.

The damaging effects of land expropriation were obvious, but we must distinguish between the effects of superior political and military power and the outcomes of an exchange economy. Bundy tends to confuse the one with the other. In fact, the growth of a market economy provided many blacks with scope for material advance, which they made the most of. There is plenty of evidence that Africans responded positively to market opportunities as they gained access to European practical education and agricultural methods. Also, those who suffered the greatest cultural and political disruption through European contact, such as the Mfengu and the Xhosa, responded most positively to the coming of a market economy. More isolated Africans, less subject to the shattering of their traditional ways, did not respond in the same entrepreneurial fashion.

The decline of the African rural sector was hardly avoidable, given the much smaller areas into which blacks were crowded in the course of European expansion. Their system of extensive farming and communal tenure required large unoccupied spaces, no longer available after mid-century. More rapid population growth followed the restoration of peace and the improvement of transportation, which eliminated subsistence crises. Population growth put additional pressure on an already burdened land area.

Minerals and Structural Change

The second great watershed of South African history in the nineteenth century was the discovery of diamonds and gold. The development of the mining sector transformed the South African economy. Until then only leisurely growth appeared feasible, despite the introduction early in the nineteenth century of institutions that favored market forces. Between 1886 and 1914, gold mining dominated the economy, exerting a powerful impact on other sectors and on all regions of the country as market forces broke down the transport barriers that had previously inhibited development.

The South African economy now began to experience structural changes typical of modern economic growth. Increases in real income per capita accompanied shifts of resources from primary production to manufacturing. The capital stock rose in relation to the labor force. The output share of the services sector went up, and manufactured exports increased. These trends typify a developing economy. But South Africa's proved a partial exception to typical structural changes, mainly because of the continued importance of gold mining.

Gold mining has been the leading sector of the South African economy for most of the last century, and its preponderance has imparted to the

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country's growth certain highly distinctive features. It has made possible a distinct if uneven rise in living standards and, not least, has provided a substantial share of the resources to accommodate the pervasive rent-seeking that has been a hallmark of South African history in the twentieth century. If South African economic development was, to repeat the words of Frankel (1938), "governed by numerous monopolistic and sectional interests, by particular fiscal policies and by exceptional social techniques and institutions," it was facilitated and substantially caused by the dominance of gold.

From Union to Apartheid

The coming of Union in 1910 established for the first time, in North's terms, a single third-party enforcer of impersonal exchange over the whole country. Ideally, the coercive power of the state would have resulted in the effective monitoring of property rights and enforcement of contracts. To a large degree, it did. But of course that has not been the whole story. The increasing role of the state brings with it the prospect of policies inimical to growth and aimed at redistribution instead. Even in the most developed countries the institutional frameworks have been "mixed bags." What is outstanding about the South African mixed bag is that so much of it has consisted of institutional components that have unabashedly promoted ethnic rent seeking by groups with bargaining power within the system.

From the beginning, laws were passed that benefited influential interests. Before Union, mineowners had repeatedly attempted to establish a monopsony for the recruitment of cheap and, incidentally, black labor. However, although after 1900 the gold mines had obtained the right to recruit from outside South Africa, attempts at monopsonization failed, due to familiar collective-action problems. But in 1911 a Native Labor Regulation Act was passed that licensed recruiting agents and prohibited the breaking of labor contracts by the offer of higher wages. The next year the desired monopsony at last arrived in the form of the Native Recruiting Corporation, which duly achieved a reduction in the cost of unskilled labor.

Of course, organized white labor has been, in Mancur Olson's term (1982), the main "distributional coalition" in twentieth-century South Africa. In 1911 the passing of the Mines and Works Act, more accurately known as the Color Bar Act, laid the foundation of white privilege in the mines. It provided that blacks could not legally perform a variety of skilled and semiskilled jobs in the Transvaal and the Orange Free State. White trade unionists, fearful of competition from blacks willing to accept lower wages, were the driving force behind passage of the act. Plainly it did not benefit mineowners, who preferred to hire black workers at market rates and in greater proportions than the law allowed.

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From the end of World War I to 1970 the rate of growth of real GDP usually averaged over 5 percent per annum. But the South African economy became the scene of so much government intervention with market forces that its achievement of such rapid growth is something of a mystery. The vested interest groups with the greatest bargaining power at particular times with particular governments benefited from the interventions.

The Nationalist-Labour Pact government that came into power in 1924 looked askance at the capitalists' propensity for employing the cheapest labor regardless of race. It set about making South Africa safe for "civilized labor." Employers received a variety of incentives, when they were not actually instructed, to give jobs at artificially high wages to unskilled "poor whites," refugees to the towns from a backward rural sector, who would not otherwise have been able to compete with still poorer blacks in the marketplace. The "rate for the job" effectively prevented undercutting by members of the wrong race. Formal apprenticeship requirements made competition by blacks for skilled jobs impossible. In return, employers gained protection against foreign competitors and passed on their higher costs to consumers in the form of higher prices.

The backwardness of the agricultural sector also reflected the influence of the institutional environment. In the overpopulated African reserves, communal systems of land tenure and the ban on Africans' acquiring land in "white areas" prevented potential innovators from obtaining and investing in holdings big enough to allow higher productivity. The politically important white farmers received plenty of largesse from sympathetic governments, but insulation from the market brought its own penalties in the form of low productivity and out-of-date methods.

Up to World War II, gold mining provided the means to shelter white farmers, manufacturers, and workers from competitive economic forces. The familiar justification was that gold was a wasting asset. Where would the country be when gold was no longer there to provide an income? Obviously, the self-serving arguments went, resources yielded by mining should be used to stimulate other activities that would still provide jobs and incomes when the golden eggs were no longer being laid. The upshot was the diversion of resources from a mining sector that did not require government assistance to sectors that could not survive without tariffs, subsidies, and other forms of protection against market forces.

Rent seeking will occur in any economy. The best that can be expected is that the incentives embodied in the system of property rights will strongly encourage profit seeking rather than the competitive pursuit of monopoly rents. In this sense the economic rules of the game in South Africa had limited success. The rent seeking often took the form of mobilization of ethnic groups to obtain rents through the political process. As Jennifer Roback has

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argued, "Ethnic groups have certain advantages as rent-seeking coalitions. They are already organized for cultural and religious purposes and it is often inexpensive for them to become so for political ones. People can not easily change their ethnic identity in order to evade ethnic-based taxation or other costs" (1988, 67).

From Apartheid to the New South Africa

Racism as a form of rent seeking was prevalent before 1948. The arrival in power of the National Party in that year only gave a huge boost to a time-honored South African practice. The new rulers were committed to a far more strenuous enforcement of white supremacy than any of their predecessors. The Nationalist electoral alliance of white workers and white farmers required policies that entailed extensive intervention into the free labor market preferred by capitalists. They managed to achieve their objectives in many ways, most conspicuously in the form of controls over black migration from the black rural areas, known as the Reserves. The controls provided white farmers with relatively cheap labor, and white workers with protection against permanent-seeming Africans in urban areas.

In other forms as well the government ensured the continued support of its special interest groups. Farmers received state subsidies, marketing boards fixed favorable prices for their products, and the taxpayers funded agricultural research on an impressive scale. White workers obtained additional shelter through the reservation of the better jobs for themselves.

Clearly, "the apartheid state" was an interest-group state. As one of the exponents of this interpretation has stated the argument:

> The function of an interest group state is to specify and enforce property rights which maximize the wealth of politically influential groups, even if total societal wealth is diminished in the process. Regulations are enacted by the state if it perceives that the marginal gain to beneficiary groups exceeds the marginal disutility to loser groups. The political equilibrium is therefore determined by the relative effectiveness of competing interests at producing political influence—i.e. controlling free riding. (Lowenberg 1989, 62)

The story of apartheid then becomes a tale of the struggle between competing interest groups. Apartheid becomes transformed because the political influence of some interest groups declines and the influence of others increases. The state passively responds to the rent-seeking behavior of pressure groups; it is simply there to do the best it can for the groups with the most political muscle.

The problem with this approach is its assumption of state passivity. North has described the rent-seeking literature as

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> consistently an interest group modeling of the political process in which ideological constraints on maximizing at certain margins are not part of the argument.... The strength of ideology is the premium individuals are willing to incur not to free ride; in its absence—in a world of universal maximizing by individuals—the costs of contracting would be so great that economic activity would be limited indeed and the stability of institutions impossible. (1984, 37, 39)

But this argument is itself open to an obvious objection. The importance assigned to ideology is too often "a euphemism for ignorance": when something cannot readily be explained, invoke ideology (Rogowski 1988, 314). For a compelling argument, in each particular case the importance of ideology and the role it plays must be demonstrated, not merely asserted.

In South Africa ideology played an important—and specifically orchestrated—role. At first Nationalist power based itself on Afrikaner cohesion. As long as the government was pursuing goals viewed as in the overall interest of its ethnic constituency, above all, the preservation of Afrikaner rule, it had considerable independence in relation to particular interests. Later, especially after the Nationalist split in 1982, when the Afrikaner right wing broke away, the Government began to elaborate a "white" ideology to attract a solid English-speaking following. Here it had substantial success and therefore enjoyed, as before, a broad enough base of support not to be unduly responsive to the pressures of specific groups, as businessmen discovered again and again in the 1980s.

The Nationalist government could simply ignore dominant white interests. In some obvious, tautological sense apartheid ultimately went under because to the ruling whites its costs came to exceed its benefits. But ideology affected the timing of apartheid's demise. By the 1980s the traditional apartheid constituency may have waned, but the new constituency in which business interests could have been expected to be so important had surprisingly little effect on the determination of P. W. Botha's government to hang onto ultimate white control in a variety of unsubtle guises.

Until the 1970s, restrictions on the mobility of black workers grew steadily. Capitalists were the clear losers, so much so that as the costs to them of apartheid rose they became vocal in their criticisms of a system they had previously endured in silence. Increasingly, from the 1970s onward government policies appeared to reflect the growing importance of businessmen in the economy and the declining importance of white labor and agriculture. This was the time of "neo-apartheid," a more sophisticated version of discrimination that accepted black urbanization but still attempted to control and channel it in the interests of white survival and supremacy.

Yet oddly, in many ways the refurbished apartheid of the post-1970

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years failed to suit the entrepreneurs of South Africa. The tighter influx control that accompanied the acceptance of the permanence of some blacks in the urban areas was scarcely designed to keep down the labor costs of employers. Strangely, the government appeared unmoved by criticisms from businessmen. After P. W. Botha became head of government in 1978, he attempted a rapprochement with businessmen, but it was one of the shortest honeymoons in history. His resentful and abusive response to their complaints became a feature of South African political life in the 1980s.

What happened in South Africa was more complex than it appears in the conventional explanations in terms of interest-group pressures or the need to appease capitalists. By the early 1970s, white South Africans had got hooked on growth and were not prepared to dispense with its benefits. Appeals by right-wing trade unionists that growth should adapt to the amount of skilled labor that could be supplied by the white population simply did not resonate with a materialistic white electorate. In 1972, in spite of strong right-wing pressures, the government refused to accept a lower growth target than that proposed by the Economic Development Program. Historically, governments have had only limited success with activist economic policies, but their ability to destroy or retard growth has been impressive. The decision by the Nationalists not to heed conservative demands for the appropriate restrictions on black labor laid the foundations of neoapartheid.

Growth policies had to favor businessmen in overt ways. The crux of the matter, however, was that the Nationalists had deliberately exploited ethnic consciousness to build a political power base that allowed them to flout particular interest groups with some ease if they wished to do so. During the 1980s the Government's independence of special interests was underlined by the constitution of 1984, which placed extreme power in the hands of the state president. That this was even possible reflected the Nationalists' success at evading the constraints of pressure groups. Control of the National Party was all that was needed to remain in power; whatever the theory of power sharing, the practice remained adamantly different. It was, of course, business as usual, but within the party power had become more than ever a one-man affair. What Botha did not realize was that he at least needed the National Party, however much it responded to its master's voice. When he resigned the party leadership in February 1989, he discovered that he had abandoned his only power base; the worm, or rather worms, at once began to turn. This event marked the beginning of the end for the "imperial president."

Why then did the government so suddenly and decisively go back on its past in February 1990? It seemed to have become a one-man show: what the man at the top said, went. There is little evidence that strong pressures by politically influential interest groups led to the change of course. F. W. de

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Klerk simply changed his mind in a hurry. Although he has not yet been effusive about what induced him to think so fast, it seems fairly clear that he had come to recognize what had eluded him only a short time before, namely, that the costs of apartheid exceeded its benefits to the white population. Yet, had de Klerk not taken the initiative, had he continued down the middle road as he had been doing all his political life, it is hardly likely that he would have faced a revolt of rent seekers and interest groups within the broad majority of the white population that had voted for some version of reform in September 1989. De Klerk's initiative confirmed once more the substantial scope for independent action of the top Nationalist leadership, flowing from the National Party's success at Afrikaner and, later, white mobilization. It is a safe bet that Botha would have responded differently. The ethnic ideology the National Party had so assiduously nurtured paradoxically made the transition to majority rule easier.

Of course, the rest of the world also played a role in the development and fall of apartheid. From 1985 on, South African apartheid was perhaps *the* great moral issue of the world community. The country became the target of global sanctions and a disinvestment campaign that was both sustained and vociferous. Yet it is difficult to assess the world community's effect in ending white rule. Perhaps foreigners helped make the apartheid regime realize its own folly, although, at least under Botha, any such realization was well concealed. The white community undoubtedly felt beleaguered by the rest of the world, but it is not clear to what degree this feeling was conducive to reformist sentiments. Also, there were sanctions-busters aplenty, alert to the lure of profits and indifferent to the wider moral issues.

In short, it appears more plausible to argue that apartheid was undermined from within. As Arthur Lewis has argued, the "most effective destroyer of discrimination is fast economic growth.... The disadvantaged and the subordinate have a vested interest in fast economic growth. Every reduction in the target rate for economic growth is also a reduction in the strength of equalizing forces" (1985, 44, 121). From the mid-1970s on, the South African growth rate declined markedly, but by then the damage had already been done. Black urbanization, and all that flowed from it, had become an irreversible feature of the South African economy.

Conclusion

South Africa's institutional framework was clearly compatible with a substantial degree of growth, especially after the discovery of minerals. But from the beginning of European settlement, political institutions resulted in a specification of the economic rules of the game that imposed huge costs on those without bargaining power. The assignment of property rights was especially

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inadequate. The property rights of whites, who could vote, were far more secure than those of nonwhites, who could not vote. The institutional framework made possible economic development, which eventually destroyed white supremacy. But its patent defects also made ethnic rent-seeking an obvious means of seeking redistribution in the interests of particular groups. In South Africa the state was too little a "protector and enforcer of property rights" and too much a "source of insecurity and higher transaction costs" (North 1990, 35). It may not have been a carbon copy of the Mafia, but too often it behaved in ways that would have impressed members of that formidable organization.

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Law, Tradition, and the Transition in Eastern Europe

SVETOZAR PEJOVICH

The end of communist rule in Eastern Europe and the former Soviet Union (hereafter jointly termed Eastern Europe) created an institutional vacuum in the region. New leaders faced two critical issues: what new institutions to choose, and how fast to substitute the new institutions for the old ones. After several decades of ideological brainwashing and intellectual isolation, East Europeans were ill prepared to quickly identify alternative institutional arrangements and evaluate their expected consequences. At the same time, intellectual and political leaders in the West interpreted the end of socialism in Eastern Europe as a vote for capitalism. Westerners provided public and private funding for the transition from socialism to capitalism. Eastern Europe was quickly flooded with a large variety of transition models, transition experts, and scholars who appreciated a new source of research grants.

Neoclassical economics provided the general framework for the transition debate in the early 1990s. The basic neoclassical model became a foundation for the development of transition strategies in most East European countries as well as a yardstick for evaluating economic outcomes. According to the tenets of neoclassical economics, the transition required macrostabilization, privatization, market prices, free international trade (including convertible currency), and a balanced government budget. East Europeans were assumed to be rational utility maximizers who would quickly and cost-

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lessly perceive new opportunities, evaluate their consequences, and make the utility-maximizing choices. Privatized assets, regardless of their initial ownership, would quickly move into their highest-valued uses. In this scenario, it seemed appropriate to encourage the new leaders in Eastern Europe to use the strong hand of the state to build capitalism.

Many property-rights and public-choice scholars regard neoclassical economics as ill suited for informing the institutional restructuring in Eastern Europe, largely because of its lack of appreciation for the importance of transaction costs in a world of uncertainty and incomplete knowledge. Transaction costs are the costs of all resources required to transfer property rights from one economic agent to another. They include the costs of making an exchange (e.g., discovering exchange opportunities, negotiating exchanges, monitoring, and enforcement) and the costs of maintaining and protecting the institutional structure (e.g., judiciary, police, and armed forces). Academic research and empirical evidence have established that different institutional structures generate different transaction costs.

Enrico Colombatto and Jonathan Macey (1997) have commented as follows on the neoclassical model in the analysis of the transition process:

> The virtues of this stereotype in a frictionless, zero-transaction costs world are beyond dispute. Nirvana economies always work, by definition. It [was] indeed acknowledged that the adjustment process involves some costs and that, as a consequence, national income may drop in the short run. But this [was] usually considered an affordable price to pay in order to achieve "optimality." In other words, transaction costs [were] not looked upon as part of the transition problems, but rather as an unpleasant by-product.

Most transition models paid little attention to transaction costs. They failed to identify, and therefore to reduce, some inevitable types of transaction costs specific to the post-1989 adjustment process in Eastern Europe: the costs of convincing East Europeans that the legal system could be stable and credible; the costs of training new judges and lawyers; and the costs of helping ordinary people understand the requirements of institutional restructuring. Moreover, the transition entailed transaction costs that could have been avoided: frequent changes of rules, insecure property rights, and restrictions on the tradability of privatized assets.

An important aspect of the transition debate in the early 1990s involved the comparison of alternative stabilization models. The debate, initiated by Jeffrey Sachs, gave rise to a number of impeccable technical proposals for solving economic problems such as inflation, unemployment, and trade and budget deficits. But the proposals ignored the effects on

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transaction costs of frequent adjustments in the rules. Evidence shows that uncertainty about the rules had major effects on stabilization programs in the early 1990s (Bossak 1993, 15–17; Cuckovich and Sirotich 1994, 87–90; Madzar 1995, 223–63).

The privatization debate focused on the costs of alternative privatization techniques and their fairness (e.g., spontaneous privatization, preferential treatment of the employees of business firms, and restitution). With a few exceptions, such as Jan Winiecki (1991) and Ljubo Madzar (1994, 7–66), analysts failed to focus on the effects of various privatization rules on the incentives of owners to seek the most valued uses of their assets.

Finally, from the standpoint of ordinary people in Eastern Europe, the transition process forced upon them institutional changes alien to beliefs and behaviors embedded in the fabric of community life (the more so, the farther to the east). They experienced the switch of one set of institutions for another, neither of which they chose for themselves. In most East European countries, privatization programs ultimately favored former nomenklaturists, the Czech Republic being perhaps the only exception.

By the mid-1990s, procollectivist parties (socialists, social democrats, communists, nationalists, and other anti-free-market parties) were gaining ground in many East European countries. For example, Hungary and Poland elected socialist governments even though their economies were performing fairly well. Analysis and evidence suggest that the transition models of the early 1990s bear a major responsibility for reenergizing procollectivist parties in the mid-1990s. According to Zoltan Krasznai and Jan Winiecki (1995), "The number of confused people, convinced that all our economic problems started in 1989... seems to be quite large" (246). Zbigniev Janaz (1991), a leader of the old solidarity coalition in Poland, said: "The laissez-faire theory has not proven right. We have got to have the state intervention. The question is how deep it should be" (28).

Informal Institutions and the Transition Process in Eastern Europe

In this section I shall first summarize recent research efforts to expand the economics of property rights by incorporating into its analytical framework the effects of the interaction of formal and informal rules on transaction costs and incentives, and the effects of transaction costs and incentives on economic behavior (Eggertsson 1990, North 1990, David 1992, Krasznai and Winiecki 1995, Pejovich forthcoming) and, second, employ the interaction thesis to help understand the difficulties of the transition process in Eastern Europe.

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The Interaction Thesis

The institutional framework of a society consists of formal and informal rules, all of which determine incentives and transaction costs. Formal rules include constitutions, statutes, common law, and other governmental regulations. Governmental authorities enforce these rules by means of sanctions such as fines, imprisonment, and execution. Informal rules, referred to in this article as the "old ethos," include traditions, customs, religious beliefs, and all other interpretations of the social world that have passed the test of time. The enforcement of informal rules takes place in day-to-day life by means of sanctions such as ostracism by friends and neighbors or loss of reputation.

Clearly, informal rules are not a policy variable, whereas formal rules are. By freeing resources for alternative uses, formal rules that entail lower transaction costs contribute more to the production of wealth than do rules that entail higher transaction costs. Institutional changes and the production of wealth are then linked via the effects of those changes on transaction costs. Although some economists, historians, and sociologists have always appreciated the importance of informal institutions, Zoltan Krasznai and Jan Winiecki (1995) were perhaps the first scholars to try to embed in a theory of institutional change the effects of the interaction of informal and formal rules on transaction costs.

How formal and informal rules interrelate substantially determines transaction costs in society. I call this proposition the *interaction thesis.* If formal rules are in harmony with informal rules, the incentives they create will tend to reinforce each other. A harmonious interaction of formal and informal rules reduces the transaction costs of maintaining and protecting the rules of the social game and frees resources for the production of wealth. When formal rules conflict with informal rules, however, their respective incentives will tend to raise the transaction costs of maintaining and enforcing the prevailing institutions and therefore to reduce the production of wealth in the community. In particular, the prevailing incentive structures under which rulers operate and the constraints on their power to pursue their own private ends determine their opportunity sets and the trade-offs they face and therefore the decisions they make.

Various observations support the interaction thesis. It helps to explain the high costs of maintaining and enforcing the communist regimes in Eastern Europe. It helps to explain the differences in economic development between Catholic and Protestant countries in Europe, the effects of cultural differences on economic development in North and South America (Diaz 1988), and the differences in the costs of enforcing the right to life in religious and less religious communities. The rise of "ghettos" in American cities

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reflected a tendency of various ethnic, racial, and religious groups, all living under the same formal rules, to stay close to other individuals whose behavior they could best predict because of cultural affinities. The formal rule that limited the maximum speed on American highways to fifty-five miles per hour clearly conflicted with the driving culture of most American motorists and raised enforcement costs.

Prohibition laws in the United States clearly conflicted with the country's prevailing traditions of social drinking. The Al Capones served the important social function of giving people what they wanted, at a price. Eventually the high transaction costs of maintaining and enforcing prohibition laws helped to convince the government to eliminate the conflict between formal and informal rules concerning the consumption of liquor. People who went to jail for selling liquor in one year were contributing to the country's GNP the following year.

Douglass C. North (1990) has observed that similar formal rules tend to produce different results in different circumstances:

> The U.S. Constitution was adopted (with modifications) by many Latin American countries in the nineteenth century, and many of the property rights laws of successful Western countries have been adopted by Third World countries. The results, however, are not similar to those in either the United States or other successful Western countries. Although the [formal] rules are the same, the enforcement mechanisms, the way enforcement occurs, the norms of behavior, and the subjective models of the actors are not [the same]. (101)

A promising approach to evaluating the effects of the interaction of formal and informal rules on transaction costs is as follows. Suppose the leaders of a country decide to make a major change in that country's formal institutions (e.g., the 1964 Civil Rights Act in the United States or privatization laws in Eastern Europe in the 1990s). A new rule they enact signals their intention to restructure prevailing formal institutions. However, basic laws are often either ambiguous or too general to permit smooth application. In terms of our analysis, the new rule has to be integrated into the prevailing system of formal and informal institutions. Accordingly, public policy makers must make clarifying rules and regulations. The number of such secondary (implementing) regulations probably depends on the relation of the prevailing informal rules to the new formal rule.

Secondary laws and regulations are costly. First, their enforcement consumes current wealth. Second, they adversely affect the future production of wealth by creating a perception of frequent legal changes—as nature abhors a vacuum, investors abhor uncertainty about their property rights (Higgs

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1997). Thus, the number as well as the content of clarifying laws and regulations can be viewed as a proxy for the effect of the new rule on transaction costs.

In comments on an earlier draft of this article, Thráinn Eggertsson summarized the interaction thesis as follows:

> The basic idea underlying the [interaction thesis] is that formal rules interact with informal rules (culture) and outcomes will differ from the nominal implications of formal rules if the two are inconsistent in some sense. The viewpoint suggests that attempts to introduce structural change from above must be consistent with people's informal mental models if they are to be successful. Furthermore, different cultures are likely to follow different approaches to decentralized exchange systems, and it is hard to predict which path will be taken in a process that involves evolution and learning.

This statement nicely encapsulates the general ideas expressed by the interaction thesis. The hard part, of course, has to do with its empirical application.

The Interaction Thesis and the Transition

The transition from socialism to capitalism in Eastern Europe required institutional restructuring. As socialist rule ended, East Europeans needed stable rules for carrying out interactions among themselves and with the rest of the world. Predictably, they fell back on the only rules they knew: customs and traditions. An important question to which we now turn is whether the new formal rules in Eastern Europe, as they interacted with the old ethos, created incentives that raised or lowered transaction costs.

Informal rules in Eastern Europe are not homogeneous, but they do have some common aspects. The old ethos in Eastern Europe was largely devoid of such Western ideas as those expressed in classical liberalism and individualism. Although the Czech Republic, Slovenia, and perhaps Hungary (though only in Budapest) have a more Western tradition than other East European countries do, classical liberalism, which is only a part of that tradition, does not have deep roots in the region. The prevailing concept of community has a strong bias toward collectivism and egalitarianism. Moreover, the communities in the region have developed customs and common values along ethnic lines. Frequently a person's ethnic origin determines that person's religion—usually Islamic, Roman Catholic, or Eastern Orthodox—reinforcing the differences in customs and values among ethnic groups. Interactions within most ethnic groups are thus subject to rules of behavior that do not necessarily hold in dealings across ethnic lines.

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The old ethos in Eastern Europe clashes with Western culture, which emphasizes self-interest, self-responsibility, and self-determination; puts a premium on rules that reward performance; cultivates risk-taking attitudes; values the maintenance of individual liberties; and makes the keeping of promises important in the accumulation of wealth (Szymanderski 1995). East Europeans tend to view the gains from market activity as a redistribution of wealth rather than as rewards that individuals receive for creating new value. State authorities prefer to suppress the activities of individuals who earn large profits instead of encouraging others to emulate them in open markets. Members of collective farms in Russia have been threatening farmers who want to "go private," a credible threat in a countryside with few means of communication with the rest of the country. Small shop owners in Ukraine are treated as thieves. In general, the accumulation of private wealth in Eastern Europe is suspect, the more so as one proceeds east. Many East Europeans have yet to understand that resources are created, not found.

In 1989 East Europeans needed time to learn that capitalism is not merely an alternative mechanism for the allocation of resources but a way of life in which individuals voluntarily interact with each other in the pursuit of their private ends and, in so doing, create a culture sui generis. Forcing East Europeans to accept the institutions of capitalism before they had become comfortable with the system's culture inevitably created a conflict with the old ethos. Of course, capitalism has had to leap similar hurdles in many other countries with strong collectivist traditions. However, Japan, Singapore, South Korea, and Taiwan, among other countries, have given their people freedom to experiment with alternative institutional arrangements (Rabushka 1988). People responded by exploiting various opportunities and adopted the institutions that passed the market test. Eventually, most of those countries developed a blend of capitalist institutions and old traditions. The Czech Republic, thanks primarily to Vaclav Klaus, is the only East European country taking this approach.

As new leaders in Eastern Europe, with considerable support from the West, used the strong hand of the state to build capitalism, in effect they replaced the old conflict between formal institutions and the region's ethos with a new one. The new conflict created an opportunity for two groups, former nomenklaturists and older people, to seek personal gains by using the machinery of the state. Pursuing their self-interest, these two groups have produced some unintended consequences affecting the character of social, economic, and political life in Eastern Europe in the mid-1990s. One such consequence is the rising strength of pro-collectivist parties in the region. In the summer of 1996, socialists made a good showing even in the Czech Republic.

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Former Nomenklaturists

As socialist rule ended in Eastern Europe, former leaders had incentives to seek ways to preserve their power and privileges. Their human capital equipped them for seeking advantages in a bureaucratic environment; therefore, the transition to a free-market, private-property system threatened their well-being. To preserve the value of their human capital, former nomenklaturists, while paying lip service to free-market reforms, had to maintain or re-create a state-centered system. They knew that encouraging the perception of an external threat to their respective ethnic groups would give them a good chance to stay in power. Most former nomenklaturists, then, quickly transformed themselves into nationalists.

Doing so was easy for them because nationalism and socialism have one important common aspect: a collectivist mode of interpreting the world. In general, nationalism embraces the conviction that the community's common good transcends the private ends of its members. This idea implies that individuals can attain their greatest potential only through their nationality. Nationalism is thus incompatible with individual liberty and open competitive markets.

Indeed, most leaders in the multiethnic states of Eastern Europe in the early 1990s were communists. Examples include Slobodan Milosevic in Serbia, Milan Kucan in Slovenia, Vladimir Meciar in Slovakia, and Leonid Kravchuk in Ukraine. The former Czechoslovakia is an important case. In their quest to retain power, Meciar and his friends adroitly exploited Slovak nationalism, eventually dividing Czechoslovakia into two sovereign states. In contrast, the Czechs, with virtually no former communists in positions of power, have treated ethnic issues as a nuisance that could only interfere with getting their country on the road to economic recovery. Recently, Kim Holmes, Bryan Johnson, and Melanie Kirkpatrick (1997, xxix–xxxii) ranked the Czech Republic as the eleventh-freest economy in the world, ahead of many Western countries including Austria, Italy, and Belgium. Slovakia was ranked seventy-fifth.

Older Workers and Retirees

Under socialism, East Europeans had no opportunity to invest in privately owned assets. Instead, the state provided them with assets specific to a non-private-property economy, including (1) a variety of welfare benefits such as job security, allowances for children, medical benefits, and subsidized housing and (2) opportunities unique to the shortage economy. Retired people and older workers find the returns from those assets irreplaceable.

Older workers see capitalism as a threat to their current and future benefits from the socialism-specific assets. For good reason, they fear that

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the remainder of their working life is too short to allow them to replace the lost benefits by means of private saving and investment. Retired people have experienced a decline in the value of their pensions and other benefits.

In the shortage economy, retirees were an important asset to their families in two ways. First, they had time to wait in the ubiquitous lines for consumer goods. Second, they specialized in knowing what goods would be available, where, and when. Thus, retired people raised the real incomes of their extended families. As market-clearing prices replace controlled prices, retired people fear that they will become a liability to their families.

Therefore, older workers and retirees have incentives to oppose the transition from socialism to capitalism. They perceive capitalism as a real threat to the value of their assets. They did not purchase the socialist welfare package by choice, but that is all they got. Accordingly, many East Europeans, whatever their ideological preference might be, are hostile to capitalism for reasons of self-interest and tend to support procollectivist parties. In contrast, young people, who have little or no investment in the old system's specific assets, strongly support the transition to capitalism.

Implications of the Interaction Thesis for Eastern Europe

Some spontaneous institutional changes have occurred in Eastern Europe. For example, privately owned firms have emerged throughout the region even though private-property rights do not yet enjoy credible legal guarantees. Of the thousands of small private firms that have sprung up, many have failed or will fail, but many will survive and grow.

Spontaneous enterprises are performing a vital function that privatized enterprises do not and could not perform. They serve as the breeding ground for entrepreneurs, a work ethic, a capitalist exchange culture, and positive attitudes toward capitalism in general. They educate ordinary people to appreciate a way of life that rewards performance, promotes individual liberties, and places high value on self-responsibility and self-determination. These small enterprises will be the engine of a slow but genuine development of capitalism in Eastern Europe. Adrian Karatnycky (1996, 16) has alluded to the importance of these entrepreneurial developments. Indeed, small entrepreneurs have already begun to make contributions to both social stability and economic performance, especially in Poland, Hungary, and the Czech Republic. And in the process, ordinary people are learning about the costs and benefits of the rule of law, competitive markets, and authentic democracy.

The interaction thesis suggests that instead of building capitalism by fiat, East European governments should try to provide—admittedly by fiat—

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a legal environment that would allow people to choose among alternative institutional arrangements, that is, to participate in a "market for institutions." This arrangement would predetermine neither a specific transition path in Eastern Europe nor the rate of institutional change. But, as I have argued elsewhere (1994), the market for institutions would give people a chance to learn about the institutions of capitalism, try them out, and select those that perform well.

In contrast, using the strong hand of the state to build capitalism in Eastern Europe has raised transaction costs and distorted the politics and economic policymaking of the region. Some important consequences are given here:

First, using the strong hand of the state in the transition process requires an activist government as a means of imposing and maintaining new formal institutions. Where new formal rules were not in tune with the prevailing informal institutions in Eastern Europe, they have provided incentives for rent-seeking coalitions to be formed, and those coalitions have played a major role in subverting the transition from socialism to capitalism. Nomenklaturists and older people have adroitly exploited the old ethos to their advantage and pushed the region in the direction of government intervention in the emerging markets.

Second, exogenous institutional restructuring causes a dissipation of resources. The strong hand of the state interferes with "the constraints that are voluntarily arrived at when transactors are free to impose restrictions upon themselves" (Alchian and Woodward 1988, 65). Public decisionmakers do not and cannot possess reliable information about the economy's dynamic responses to exogenous institutional changes. Human interactions continuously create and disseminate new knowledge. The discovery and assimilation of new knowledge are unpredictable, and opportunity sets and expectations about the future are continuously changing. To assume, as in neoclassical economics, that individuals' preferences are given is misleading, as they are modified in the process of choosing and acting. In many East European countries, the conflict between new formal rules and the old ethos has given rise to nationalism, ethnic disputes, or inflation and high unemployment.

Finally, the people who impose new formal rules and those who have to implement them are not the same. The latter have considerable discretionary power in interpreting the intent of top policymakers. They also have their own incentives and private ends that are likely to differ from those of their superiors. Therefore, as the role of the state in the economy increases, additional resources are dissipated in monitoring the compliance of lower-level functionaries.

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The Tempting of Richard Posner

RICHARD BOSTAN

The reputation of Richard Posner among law professors of the Left, its measure being taken from published and casual comments, might not be any blacker if he boiled babies in their own blood and ate them.[1] Actually, he has suggested only that babies be bought and sold on the free market, as a more efficient alternative to government-regulated adoption (Landes and Posner 1978, 323). (In the absence of price incentives and disincentives, the demand for newborns continually outstrips supply. Meanwhile millions of unwanted fetuses, not permitted to possess any exchange value, are killed—in this context a better word would be "wasted"—still in their mothers' wombs.) With capitalism and profits roughly equivalent in their depravity to cannibalism in some legal academics' eyes, it is no wonder Posner is reviled. But this guru of the movement called "Law and Economics," at one time a professor of law himself and currently a judge on the U.S. Court of Appeals, has other aspects to his thought that should endear him to enemies of conservatism. Indeed, at least since the publication of Posner's book *The Problems of Jurisprudence*, calls by conservatives for Posner's elevation to the U.S. Supreme Court seem

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1. A Marxist assessment of Posner, by an author little disposed to veil his contempt for his subject, is found in Hager 1991.

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inexplicable. Fond though Posner is of free enterprise, his jurisprudence is distinctly at odds with the jurisprudence on which conservatism smiles.

Conservatives are not all cut from the same marble. Some incline to libertarianism, some to a traditionalism that reveres morality and order before individual freedom. Others, of an ecumenical bent, try to fuse together the claims of liberty and tradition, perhaps on the assumption that out of the tension of opposites—if opposites they be—comes moderation, an Aristotelian and conservative virtue (Evans 1971, 30). Thus there is no single preferred philosophy of law among conservatives. By implication, what Richard Posner conceives to be good laws and bad laws, though not without interest, is indecisive in determining whether his jurisprudence is of a conservative cast or better fit in some other pigeonhole. Decisive, however, is his philosophy of *judging*. The role of courts and how judges ought to perform their office, every bit as important in jurisprudence as philosophy of law, are issues where there can be said to be a specific conservative position, an orthodoxy with which Posner is out of sync.

Take Me to Your Leader

In their views on the judiciary, traditionalist conservative intellectuals in the United States, with the exception of the natural-law booster Harry V. Jaffa, line up behind Robert Bork.[2] Liberal senators rebuffed his Supreme Court nomination in 1987—a kind of martyrdom to conservatives. And the media attention he received at the time, which he did *not* relish, has had the unintended benefit of lending Bork the kind of visibility and public stature legal scholars dream of but seldom attain. The inevitable book, Bork's *The Tempting of America: The Political Seduction of the Law*, became a best-seller and what one law professor calls "surely the most widely and most unfavourably reviewed book in law review history" (Graglia 1992, 1019). Sticking with the superlatives, it and its author probably garnered the highest number of sheer insults in law review history.[3] Constitutional scholarship in American legal academe amounts almost to vindicating the judicial activism of the Warren Court era, which extended into the Burger Court, and the

2. The majority of conservatives, including Bork, may support natural law, but not including Jaffa they say it is the responsibility of legislators rather than judges to bring positive law into conformity with natural law. Jaffa's book *Original Intent and the Framers of the Constitution* has been harshly reviewed by Bork. See Bork 1994.

3. Of note is the review by a liberal law professor whose credentials are positively dwarfed by Bork's: Suzanne Sherry says that Bork is "not much inclined to serious thought" and continues: "Indeed I would have doubts about granting tenure to the author of *The Tempting of America*." So she says of a one-time Yale Law School professor, solicitor general of the United States, and U.S. Court of Appeals judge (Sherry 1990).

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spirit of which is not dead even in the Court currently presided over by conservative Chief Justice William Rehnquist. It was against that scholarship and the judicial activism it lauds that Bork set his book.

Recounted in the early pages of *The Tempting of America* is an anecdote involving Oliver Wendell Holmes Jr., that singular giant of U.S. Supreme Court history. After Justice Holmes and Judge Learned Hand had lunched together one afternoon, and Holmes began to leave to resume work, Hand called out, "Do justice, sir, do justice." Holmes reproached him: "That is not my job. It is my job to apply the law" (Bork 1990, 6). Holmes did not intend, and Bork does not intend, to say that a judge ought to be unjust. But *laws* are sometimes unjust, and without being unconstitutional. When a judge is faced with one of those laws, as a servant of the law, he has to swallow hard and apply it. Perhaps that implicates him in injustice. (Holmes probably thought so, hence his reply to Hand.) Holmes, like Bork, believed that that is preferable to judges thinking of their duty as serving justice first and law second. Otherwise, the just judge would be, in a way, "above" the law. Rule by Platonic Guardians, whatever its merits, must give way, or self-government by the people must; they cannot stand together. That, in a nutshell, is the thesis of *The Tempting of America*. In the United States, the merits of the two regimes are irrelevant, frankly. America's Founding Fathers—who wrote a constitution that did not even make explicit allowances for judicial review (Graglia 1991, 1350)—chose self-government, and our elected representatives have not used the amendment process to replace self-government with an improved design, as of the last time Bork checked.

Bork counsels the judiciary to restrain itself, to resist the "temptation" to substitute for law abstract principles of justice and moral philosophy, which, Bork adds, may be less disinterested principle than raw policy preference. Bork indicates that over the course of American constitutional history, "judicial activism has had no single political trajectory.... The values enforced change, and sometimes those of one era directly contradict those of the prior era" (Bork 1990, 17). At the turn of the century, and at the beginning of Franklin Roosevelt's New Deal, the U.S. Supreme Court zestfully struck down government regulation of economic and labor practices, for what does not seem to be any better reason than that those legislative measures ran afoul of the laissez-faire economics in which the justices believed. But for the last four decades, judicial activism, reflecting elite intellectual opinion and cheered by law professors, has advanced what Bork calls the "modern liberal agenda" (9) when the give-and-take of democratic politics has let the liberals down.

Though personally enamored of laissez-faire economics, Bork even-handedly dismisses both the old and the new style of political judging:

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> Constitutional philosophies always have political results. They should never have political intentions. The proper question is not what are the political results of a particular philosophy, but, under that philosophy, who chooses the political results.... [In Bork's philosophy] legislators make the political decisions, and the courts do their best to implement them. That is not a conservative philosophy or a liberal philosophy; it is merely the design of the American Republic. A theory of judging that allows the court to choose political results is wrong, no matter in which direction the results tend. (Bork 1990, 177)

Not that courts should rubber-stamp whatever legislatures propose to do. Where the Constitution clearly draws a line that the government may not cross, Bork would have the judiciary hold that line against legislative encroachment (147). It is essential, however, that the protected right be in the Constitution, not concocted out of thin air.

Judicial activists whose views Bork canvasses, some of whom have sat on the U.S. Supreme Court, try to justify wide judicial discretion in interpreting the Constitution by lionizing a "living Constitution," by which is signified a document that has no fixed meaning but instead evolves over time and is malleable material out of which judges can fashion the tools needed in different circumstances to "do justice." Bork calls that interpretive theory an excuse for judges to avoid the work of interpreting law. He says there is only one credible means of interpreting the Constitution, despite most law professors' holding it in disrepute as "thoroughly passé" and "probably reactionary" (143). That means is original understanding:

> If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law." (145)

Unfortunately, *The Tempting of America* is itself replete with quotations from constitutional law scholars who refuse to concede that the Constitution is law—forget what Article VI says. To American judicial activists who conceive of constitutional law as a quick road to progressive social change, the Constitution's text is quite an inconvenience. The Constitution itself though, as a revered artifact, has been a useful pretext for judges' legislating their policy views from the bench.

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Liberal jurisprudence and liberal politics usually go hand in hand. But because Bork's jurisprudence would not purposely further what one might call the "modern conservative agenda" in politics, what makes it particularly conservative? Bork writes that when he speaks at law schools some students are always left cold by his pleas for reading the Constitution in the light of the Founding Fathers' understanding of the document's content. He says one of these students is sure to ask, "But why should we be ruled by men who are long dead?" (170). *That* question shows why Bork's jurisprudence is quintessentially conservative, notwithstanding his own claim that the philosophy of original understanding and judicial restraint is not a conservative philosophy or a liberal philosophy. His jurisprudence echoes Edmund Burke's reverence for past prescription and implies Burke's conception of society as linking generation with generation in a union of "the living, the dead, and the yet unborn." Not an ideology, conservatism is an attitude of mixed piety and skepticism, distrustful of human rationality and unchecked power. Conservatives know that "men who are long dead," speaking through the Constitution they bequeathed, are to be feared less than the ideology-driven jurist very much alive, whose "interpretation" of the Constitution is cynical and dishonest and who is himself accountable only to the judgment of God and history. For his own reasons or out of sheer coincidence, a judge might see eye to eye with a conservative on ideological ephemera like policy. Yet in his habit of thought and his ineffable quality of "attitude," he can betray that neither he nor his jurisprudence is conservative at all.

A Tale of Two Judges

Like Bork, Posner was appointed to the U.S. Court of Appeals during the Reagan administration. On the authority of the legal profession's proverb that a judge is only a lawyer who knows a politician, one might surmise, in explaining their appointments, that Bork and Posner's most salient common trait is that they knew the same politician. Not so. They were both identified, vaguely, as "right wing," which would tend to commend them to an administration of similar description. More pointedly, both were renowned as pro-free-market law professors of the "Chicago School"; Posner a pioneer in economic analysis of law, Bork the author of *The Antitrust Paradox*, a penetrating book on the faulty economics undergirding antitrust law. One obvious difference between the two men in the first half of the 1980s, when they assumed their duties as judges, is that whereas Bork's economics-related work in the field of antitrust was overshadowed by his notoriety as a proponent of original-understanding jurisprudence, Posner's mature ideas about the role of the judiciary and interpretation of law were relatively undisclosed. In 1990, the year Bork's *The Tempting of America* was published,

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Posner came out with a review essay on Bork's jurisprudence and a book, *The Problems of Jurisprudence*, the latter providing a far-ranging, more densely reasoned statement of Posner's position. To someone reading these works, the thought occurs that the rumors of Posner's conservatism have been highly exaggerated.[4]

Posner's "Bork and Beethoven," a review essay printed in the *Stanford Law Review*, does not go far before Posner remarks that he has "the highest personal and professional regard" for Bork and believes "*The Tempting of America* is a fine book which deserves its best-sellerdom" (Posner 1990a, 1368). To anyone familiar with the tactics used in book reviewing, that remark is an unmistakable tip-off that Posner intends to slash the book's contents to pieces. (To the seriously paranoid, who know what sort of literary effluvia become bestsellers, the phrase "deserves its bestsellerdom" would appear to be an example of damning with faint praise.) The first charge Posner levels against Bork is that "Bork fails to produce convincing *reasons* why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases" (1368). Posner is correct only insofar as Bork, innocent of the recondite interpretative theories of French deconstructionists, takes for granted that "interpreting a document *means* to attempt to discern the intent of the author," as Lino Graglia has put it, noting that the "difference between writing and reading (or between making and interpreting law) is that the writer seeks to communicate with the reader while the reader seeks to understand the writer's communication" (Graglia 1992, 1024). Bork's understanding of interpretation, in fact, accords with that of everyone else in the world, save the academics influenced by the deconstructionists, whose teaching that words have no meaning seems borne out only by the unintelligibility of their own writings. If Posner has an alternative definition of interpretation, it is incumbent on *him* to produce "convincing reasons" why his definition ought to prevail over the one in common currency. He does not offer that definition in "Bork and Beethoven." He does not, probably, because he is aware that the real issue is not *how* the Constitution should be interpreted but whether the Constitution should be the dispositive factor in constitutional-law cases at all.

It is simply untrue that Bork, as Posner contends, relies on "militance

4. Posner's productivity is a legend in the making. Since becoming a judge, he has, in addition to handling a heavy court docket, published half a dozen law review articles per year and a stack of scholarly books on an eclectic range of subjects, one of them on sex. The average law professor, with academic leisure, is hard-pressed to sweat out even one law review article a year. So Professor Hager's cattiness is understandable: "People wonder how Judge Richard Posner writes so much.... Part of the answer...is that Posner works incessantly and has few outside interests. The other part of the answer is that Posner's stuff is not that good" (Hager 1991, 7).

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and dogmatism" to make his case: "A summons to holy war is not an *argument* for originalism."[5] Worse than wrong, Posner is being deceptive: he *knows* that Bork has reasons for accepting and advocating originalism, writing that one of them is that originalism "is implicit in our democratic form of government. Originalism is necessary in order to curb judicial discretion, and curbs on judicial discretion are necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people's representatives" (1369). Posner calls Bork's attachment to originalism "democracy-mongering" and tries to refute the argument with embarrassingly irrelevant points, one of which is that "on the evidence of the book, Bork himself is not an admirer of popular government" (1370). *That* inference Posner makes from Bork's admission—an admission one hopes Bork would make—that majorities and the politicians they elect often support stupid laws. Suppose that Bork does not really believe in popular government; that he would endorse H. L. Mencken's perception of democracy as the art of running the circus from the monkey cage; and that he has a notion of a better system with which to replace democracy. How would those considerations debunk Bork's argument for originalism, which is that originalism is implicit in the form of government the Founding Fathers devised? *If* Bork dislikes democracy, and yet his position is that democracy has to survive and rule by unelected judges end, that only strengthens Bork's credibility by demonstrating that he practices what he preaches about the individual judge having to discount his own values and politics. Posner is obviously on thin ice if he has to nimbly skate in a very short space from denying that Bork has an argument, to admitting that he does, on to refutations of the argument that make Bork look better than he might without Posner's "critical analysis."

The objection to Posner is hardly that it is out of bounds to criticize Bork. A syllogism on the order of "Robert Bork is a conservative; Richard Posner disagrees with Bork; therefore Posner is not a conservative," would be invalid, were anyone to formulate it. *The Tempting of America* comes unhinged in several places, and Posner perspicaciously draws attention to these shortcomings that almost all conservatives have noticed with displeasure. For instance, Bork mounts an originalist defense of the conclusion, certainly not the reasoning, in the U.S. Supreme Court's decision in the 1954 school desegregation case *Brown v. Board of Education*. The state law in question was an offshoot of the baldest kind of racism. An orthodox reading of the Constitution would have upheld the law. In Chief Justice Earl

5. Posner affects a pose of hard-headed rationality and juxtaposes that with Bork's "religious" posture. That only helps Posner come across as a smart-alecky village atheist, throwing tomatoes at the local priest. Not an endearing picture (Posner 1990a, 1369).

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Warren's own words, the Supreme Court chose to "do the right thing," furnished an utterly tortured interpretation of the Fourteenth Amendment, and voided the law.

Anyone today who suggests that the Supreme Court was wrong to outlaw racial segregation in public schools, which is the uncomfortable stand a consistent originalist *has* to make, disqualifies himself from any respectful hearing: because he is ipso facto "immoral," because he is a "racist," the liberal law professors whisper and nod among themselves, when they are not shouting the accusations at originalists like Bork. Bork opted to spare himself the trouble. The result in *Brown*, he wrote, "is consistent with, indeed, is compelled by, the original understanding of the fourteenth amendment's equal protection clause" (Bork 1990, 76). The problem is, no one besides Robert Bork believes that, if even Bork believes it. Posner rightly observes that the original intent of the Fourteenth Amendment's equal protection clause is comprehended by recalling "its background in the refusal of law enforcement authorities in southern states [after the Civil War] to protect the freedmen against the private violence of the Ku Klux Klan"; this historical background suggests "that all the clause forbids is the selective withdrawal of legal protection on racial grounds. A state cannot make black people outlaws by refusing to enforce the state's criminal and tort law when the victims of a crime or tort are black" (Posner 1990a, 1374–75). As unjust as racial segregation seems to us, it was never unconstitutional. Bork ought to have had the courage to say that.

If the sum of Posner's reservations about Bork was the proposition that Bork is on the right track but insufficiently careful to stay on it, that would be criticism one might expect and applaud from a fellow conservative jurist. But Posner's More-Originalist-than-Thou critique of Bork's position on *Brown* is only role-playing, meant to prove that nonconstitutional "interpretation" is inevitable and, all in all, a pretty good thing. Posner approves of *Brown* for the same reason liberals approve of *Brown*: it was a good result, and the end justified the means—the style of constitutional interpretation—that achieved the result. Posner is, in a way, more radical than some of the standard liberal critics of Bork and originalism. Some of the liberals rest their position on the claim that it is epistemologically impossible to grasp the original understanding of a provision of the Constitution as a law; thus it is folly for a judge to worry about what an amendment or law meant at its inception. However, as shown by Posner's excellent interpretation of the Fourteenth Amendment's equal protection clause, Posner knows that original understanding *is* within a judge's power of comprehension. He just thinks it should not matter very much. In Posner, one can almost hear the arrogant whine of Bork's presumptuous law student: "But why should we be ruled by men who are long dead?" Much as that

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question, put to Bork, reveals the conservatism of Bork's jurisprudence, the fact that Posner can be easily imagined asking the question exposes Posner's core liberalism.

The question of why we should be ruled by men long dead—self-evident, to the liberal, as devastating and unanswerable—proves too much. Why not bury the Constitution with the men who made it? Why not draft a new Constitution and, if not exactly surrender it to the worms, at least retire the old one to a museum where, as a quaint historical curiosity, it can be propped up on a cushion alongside George Washington's wooden teeth and Betsy Ross's flag? (Of course, the *original* document is in a museum, but one catches my drift.) Had America's founders not desired that their country's constitutional law be somehow anchored in the past, they would not have departed from England's tradition of keeping an unwritten constitution, which by definition would be unfixed and evolve like the "living Constitution" liberals, and Posner, too, say they want.[6] The American conservative in public life seeks to conserve what the Founding Fathers wrought; the American liberal, like Lot fleeing Sodom, tries not to look back. Opposed to Bork's challenge to the judiciary to let the Founding Fathers guide its work, Posner advises against "slavish obeisance to the [Constitution's] framers' every metronome marking" (Posner 1990a, 1380). Whatever Posner's jurisprudence is, conservative it is not.

Once Bork's originalism has been reduced to ruins (Posner thinks), Posner too briefly unveils the jurisprudence to which he subscribes: "in the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations are decisive; to the consistent originalist, they are irrelevant" (1380). One of the first pragmatists, John Dewey, was entitled, as everyone is, to go by the name he chose to describe himself. But he was still a liberal, well-nigh the most important American liberal intellectual of the twentieth century. The jurisprudence Posner calls pragmatic is similarly liberal jurisprudence rebaptized. Posner's jurist, instead of glancing back to the Founding Fathers or more proximate lawmakers or the Constitution—prescriptive sources—falls back on his "private stock of reason," which Burke recognized is too small in most individuals to carry them through their own lives, never mind to judge and reinvent societies by—the project the liberal French *philosophes* of the Enlightenment envisaged. Judicial activism, the collapse of the distinction the Constitution makes between legislative and judicial branches of govern-

6. Posner says, "Bork is well aware of the practical impediments to amending the Constitution, but he is unwilling to draw the inference that flexible interpretation is therefore necessary to prevent constitutional obsolescence. The amendment process is too slow, too cumbersome, too easily thwarted to maintain a *living* Constitution" (my emphasis; Posner 1990a, 1372–73).

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ment, would proceed apace under the aegis of the "pragmatism" to which Posner builds a shrine.

Once More into the Breach

The shrine to pragmatism, party visible in "Bork and Beethoven," is starkly displayed in Posner's *Problems of Jurisprudence*. The book was received with open arms by academics usually placed opposite Posner on the political spectrum, including the doyen of Political Correctness, not to mention trendiness, Stanley Fish (1990): "it is perhaps superfluous for me to say that I agree with him on almost every point" (1456). Sanford Levinson's (1991) review gloats that "Posner's newest work will be much more happily embraced by the left than by many of his mundane political allies on the right" (1233 n.60). A Marxist law professor writing about *The Problems of Jurisprudence* was uncharmed, but Posner had evidently softened, or grown, enough that the professor could not help but wonder if Posner hoped to stake out ground as a "centrist jurisprude, appropriate perhaps for a Republican nomination to the Supreme Court. Perhaps because his reputation as an ideologue of the right could stand in the way of ascension to the Court, Posner goes to considerable lengths to disclaim identification as an ideologue of any sort" (Hager 1991, 8). (After Robert Bork's Supreme Court nomination was torpedoed, having a "right-wing reputation" was clearly a liability to an ambitious jurist.) Again, "conservatism is the negation of ideology," someone once said. Posner comes off as every bit the ideologue in his jurisprudence book; what he says is just so conventional in the liberal milieu of legal scholarship that the ideology, manifest in a license extended the judiciary to indulge in social engineering, seems too unremarkable to make a fuss about.

There is no gainsaying that *The Problems of Jurisprudence* is brilliant. It is a study of jurisprudence covering every orbit of jurisprudence and commenting on all, or what appears to be all, of the bright lights who have illuminated the field. Unleavened by the concessions Bork made to hold the attention of a broader audience, *The Problems of Jurisprudence* is erudite in a fashion *The Tempting of America* does not come close to being.[7] But so far as Posner's treatment of the judiciary and judicial interpretation of law is concerned, the prowess of the oarsman is little compensation for the gaping holes in the bottom of the boat he propels. Or to employ a metaphor closer to home: Posner's predicament is that of the good lawyer with a bad case. He states in his introduction, sensibly, that

7. *The Tempting of America* was published by a commercial publisher, *The Problems of Jurisprudence* by a university press. The latter did *not* grace the bestseller list.

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> Judges do not want to be the handmaidens of the powerful. But if independence means only that judges decide cases as they like without pressure from other officials, it is not obvious that an independent judiciary is in the public interest; the people may be exchanging one set of tyrants for another. (Posner 1990b)

The word *tyrant* is appropriate: tyranny is rule without subordination to law. Posner condemns "lawless" judges. His task, then, is to present the judiciary in the role he believes it should perform—active, not self-restrained; attentive to social consequences, not oblivious to all but the inexorable logic of the law—and to show that the judiciary in that role would be something other than a law unto itself, something other than tyrannical. Posner fails that task.

An interesting observation, somewhat amusing on its face, is that both Bork and Posner pledge fealty to Justice Holmes and invoke the words and deeds of the old master to support their views on precisely the issues about which they disagree with each other. Ironic, but not incredible, for the same man has two different legacies. Holmes the Supreme Court justice, on the high bench for the first three decades of this century, was not quite an unfailing practitioner of judicial restraint, but he was nearly that. Though skeptical that there was much wisdom in increasingly popular legislation interposing the state between worker and employer (White 1982, 656), for instance, Holmes said if a majority of Americans wanted to go to hell and their representatives passed laws to that effect, he was obligated to help them get there. This is Bork's Holmes. But the other Holmes, the scholar and theorist, prepared the intellectual foundations for judicial activism through writings of the stamp of "The Path of the Law," a speech made in 1897 and printed in the *Harvard Law Review*, destined to become the most famous law-review article ever. In that article Holmes derided the idea that law is discovered in preexisting legal materials, asserting that on the contrary, judges' opinions are only policy choices couched in logical form and that the model judge always considers social advantage and the remoter consequences of his decisions. The "black letter man" has had his day, Holmes declared: the lawyer and judge of the future would be "the man of statistics and the master of economics" (1897, 469). Here is Posner's Holmes.

Consciously retracing Holmes's footsteps, Posner attacks legal formalism, defined by him as "belief in the possibility of obtaining right answers to legal questions by means of conventional methods of legal analysis, mainly the careful reading of texts to find the rules in them, followed by deduction from the rules to the outcomes of the particular case." Or, he simplifies further, "formalism can refer simply to the use of logic to reason from premises to legal conclusions" (Posner 1990b, 40).

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Obviously Bork is a formalist. He writes in *The Tempting of America* that "A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result" (Bork 1990, 2). Bork is not gullible; *The Tempting of America* is a testimony, albeit damning, to judges' churning out decisions by gut instinct, and almost according to digestion. But what Bork despairs over as deviant, Posner, keeping company with the leftist law professors of the Critical Legal Studies movement, seems to fancy is simply the way judges are, have always been, and will be for time without end. "Rules mask—they do not eliminate and may not even reduce—the role of the subjective and the political in the formation of legal rights and duties" by jurists, Posner writes (1990b, 48).

As a bare description of today's judiciary, Posner's assessment, as well as that of the "Crits," has a modicum of merit. It may overgeneralize from the empirical evidence, but enough specific cases can be cited to lend the theory a surface plausibility. But as an argument against legal formalism, and Posner intends his description of the judiciary to be such an argument, Posner's argument is fallacious. Specifically, Posner commits the naturalistic fallacy: deducing the ought from the is. It does not follow that because judges inject their own policies into the law that they should do so. Legal formalism *prescribes* what judges ought to do; it does not necessarily *describe* what judges do. If Posner wants to topple legal formalism as a normative theory of adjudication, he has to demonstrate not that judges do not currently perform their jobs in line with legal formalism's principles but that legal formalism is either impossible or undesirable. Impossibility he entertains but finally spurns: "I risk leaving the impression that I think *all* statutory and constitutional interpretations are policy decisions by judges. That would amount to a denial of the possibility of written communication" (1990b, 293). What can one take that statement to be, besides an admission that legal formalism is not only possible but occurs in the real world? In a delightful passage that could have been written by Bork or any other originalist, Posner takes down "text skeptics" more than a few notches:

> Extreme communication skeptics are, without exception, academics. This is curious. They more than most people depend on, and daily experience, successful communication. Their careers depend on their ability to communicate with other people (often many other people) in writing. When their books and articles are misunderstood they are indignant. When they write an examination they expect their students to understand it; if the examination contains an ambiguity the teacher is embarrassed—he does not say to the students, "Well, what did you expect?" A leading text skeptic was

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> not amused when, his article submitted to the *University of Chicago Law Review* having been turned down after a letter from the editors that he interpreted as a promise to publish the piece, he was told by the editors that they interpreted the letter differently. (Posner 1990b, 295)

The truth is that Posner rejects legal formalism because it would keep judges on too short a leash. His is, in a manner of speaking, a mind at war with itself. He feels constrained to make the customary assurances that judges ought not to be lawless, ought not to be tyrants loosed on society; but he desires for judges—perhaps it is accurate to say he desires for himself *as* a judge—wiggle room to "do good." That giving judges such room means allowing them, allowing himself, discretion to potentially do evil does not seem to have made it into his calculations. He does not so much fail in *The Problems of Jurisprudence* his task of disproving that an activist, pragmatic judiciary would be subordinate to law; his attempt, if he ever took it seriously, just slowly fizzles out. He states, boldly, that

> Obedience to rules is just one virtue among many, and it cannot be given its proper weight without considering the content of the rules and other pertinent social and moral values. It is surprising that a nation which has embraced an ideology of hostility to bureaucrats contains so many judges who apotheosize the bureaucratic virtues. (1990b, 140)

Simplistic though it may sound, the only choice is having judges who are bureaucrats or having judges who are tyrants. If he obeys all the rules without question, emulating the good soldier, the judge's office might very well be one of unmitigated, machine-like drudgery, which is how one pictures the lot of the bureaucrat. People who want creative careers should labor in vineyards other than the judiciary. The judge who picks among rules which to obey and which to ignore—or who taps his talents as an amateur moral philosopher to legislate, though that be not his sphere and he need never worry about facing an electorate—has power without responsibility, the tyrant's prerogative.

"Greatness in law implies the transcending of law—when law is defined as narrowly as the neotraditionalists would define it" (1990b, 452). Transcending law, flouting law—Posner can attach whatever label he likes to how he would have judges behave; he ends up at the same place: rule by Platonic Guardians. It is typical of the rationalistic liberal to strive to reinvent the wheel every generation, to presume that we live in a historical vacuum and that there is no question of morals or government that is no longer an open question, res judicata. When Posner, possessed by this spirit, asks, "how do

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we know that legislators really are better policy makers than judges?" (143), one wonders how a man with the breadth of knowledge to be cognizant that in India people's ages are not measured from time of birth, but from time of conception,[8] could be unaware that his own country settled at its founding that those who apply policy (judges) are not to be the same people as those who make policy (legislators). Who would better handle the legislators' responsibilities, legislators or judges, is a moot question, completely irrelevant.

The British satirist Malcolm Muggeridge, charitably crediting Pascal with coming up with his idea first, said that "judges have to be attired in robes and wigs as otherwise the threadbare nature of the justice they mete out would be too apparent for them to have authority over their courts" (Muggeridge 1978, 77). A judge is only a man or a woman, eminently fallible. Only the clothes worn, and the legal expertise the clothes represent, give the jurist the right to decide another's cause, and maybe his fate. Were every judge a Solomon, able to hold his authority just by dint of being superior, a true sage, the word of the judge alone would probably be law enough for everyone's satisfaction. But judges are not all Solomons; they are not, on average, superior to the—what, lesser breeds?—who appear before them. If people go to courts expecting justice, they are fools: the best that can be hoped for on this side of the grave and the Day of Judgment is an impartial application of the law, and these days getting *that* may be a long shot. Sure, Judge Posner is brilliant (not the same thing as wise). He can see that legislatures, and the White House and Congress as well, brim with comparatively mediocre men of whom the most celebrated and powerful, when they retire, cannot compose their own memoirs without the aid of third-rate ghostwriters. When Posner implies that judges are more capable policymakers than are legislators, what he means is that he believes *he* is more capable, and chances are he is right about that. But what elected legislators have and Judge Posner lacks is *authority* to make private policy choices into law. Posner writes,

> The concept of judicial decision making implicit in the preceding chapters and here made explicit raises a question of judicial legitimacy: who has licensed judges to decide cases in accordance with social vision? But to state the question this way is to appeal covertly to a political theory, one that regards the judge as an agent of legislators, of constitutional framers, or of earlier judges and thus

8. Posner's familiarity—which extends well beyond just superficial knowledge—with an array of fields of learning gives *The Problems of Jurisprudence*, and almost everything else authored by Posner, the mark of having come from the pen of a cosmopolitan, a Renaissance man (Posner 1990b, 266).

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> insists that every judicial decision be fairly referable to a command by a principal—in other words, that decisions be pedigreed. (1990b, 135)

Thus does Posner elude answering the question he poses, the answer to which is that *no one* has "licensed judges to decide cases in accordance with social vision." And the political theory to which he refers has a name: it is "constitutionalism," and one of its premises is that arbitrariness has no proper place in a legal system, even when practiced by brilliant people like Judge Posner.

Conclusion

Posner, as a law professor and as a federal judge, has passed as a conservative because he has exhibited a sign usually peculiar to conservatives in academe and the judiciary: a better than tenuous grasp of economics. For membership in the conservative fraternity, that gets his foot in the door, but he goes no further. Posner's views about the judiciary clearly put his jurisprudential position nearer to the camp of the Left than of the Right. Conservatives are generally practical, but they have always sniffed philosophical pragmatism suspiciously, inclining to excoriate it as a repudiation of prescription in favor of an unprincipled end-justifies-the-means way of approaching problems. The cool disregard Posner has for America's Founding Fathers, as though their meticulous design for republicanism and separation of powers does not matter because they have passed from the scene, runs counter to one of American conservatism's most deeply rooted convictions, which holds that if the present generation can reach higher than those who have lived before, it is only because it stands on the shoulders of giants. In the United States, the Founding Fathers are giants; dispense with their vision, their support, and Americans might come crashing down. Posner's fulminations against what he calls "framer idolatry" puts one in mind of George Santayana's sardonic swipe at liberalism's anti-intellectual presentism: that we do not nowadays refute our ancestors, we kindly wave them good-bye.

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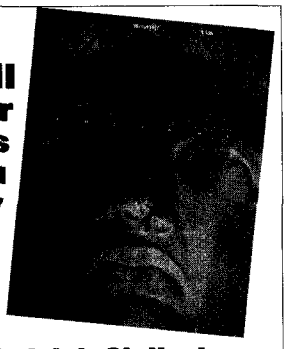

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CONTROVERSY

Bostan, Bork, and the Jurisprudence of Limited Government

ANDREW RUTTEN

Richard Bostan offers a spirited and witty critique of Richard Posner's constitutional jurisprudence. He argues that Posner is not a real conservative, but a poseur who plays the part when it suits him. Like a real conservative, Posner embraces economic theory and free markets when discussing economic policy. But unlike a real conservative, Posner embraces pragmatism as the method of interpreting the Constitution. According to Bostan, a real conservative follows Robert Bork and embraces originalism as the method of interpreting the Constitution. In his words, "conservative intellectuals in the United States [with one exception] line up behind Robert Bork." They do so not out of blind hero worship but because any other interpretative approach gives judges far too much autonomy, thus leading us farther down the path toward tyranny of the majority—the majority of the Supreme Court, that is.

This approach has its merits. Most obviously, because Posner wrote an unfriendly review of Bork's *The Tempting of America* (Posner 1995), he has given Bostan ready material from which to build his case. Thus, there is little need to worry that Bostan has misconstrued Posner. Unfortunately, arguing

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that because Posner disagrees with Bork he is not a conservative also has serious drawbacks. Most salient, it simply is not true that originalism is the *only* jurisprudence of those who espouse limited government. Nor does pragmatism imply a lack of respect for American constitutional traditions. To the contrary, Posner's position has a long and honorable history in the United States. Even today, many libertarians adopt it instead of the strict originalism favored by Bostan and Bork.

More distressing to Bostan's argument is that Bork provides a weak foundation on which to try to build a case for originalism. On closer inspection, Bork's defense of originalism turns out to be a house of glass built on the sand. Bork has built on the sand by relying on fictive history, a past that happened only in textbooks, not in the real world. And he has built out of glass by adopting, at crucial points, the methods he rejects in others. Taken together, these design flaws should make readers wary of Bostan's claim that Bork's is the only fit house for free men.

These are strong criticisms, but they are easy to prove. Because Bostan's question—What should guide constitutional interpretation?—is important, and his answer—the original intentions of the founders—is propagated by scholars as distinguished as Bork, it is worth going over the contrary case in some detail.

Is Originalism Really the Jurisprudence of Constitutional Government?

Yes, according to Bostan. As already noted, he claims that agreement with Bork provides a litmus test of one's jurisprudential fitness. Indeed, his whole argument turns on the claim that rejection of Bork entails rejection of conservative values. Is this true? Do only originalists believe in limited government? No. In fact, plenty of proponents of limited government argue for other interpretive approaches.

It is hard to see why Bostan makes his claim. Even Bork does not go so far; he openly admits that many conservatives disagree with him. Indeed, he devotes an entire chapter of *Tempting* to the topic: chapter 10, "The Theorists of Conservative Constitutional Revisionism" (Bork 1990, 223–40). In it, Bork analyzes, and then rejects, the constitutional theories of two libertarians, Bernard Siegan and Richard Epstein. Though focusing on two very different clauses of the Constitution—Siegan (1980) stresses due process, and Epstein (1985) the takings clause—both Siegan and Epstein reject Borkean precepts about how to read the Constitution.[1] Yet, as Bork notes,

1. For a fuller discussion of the differences between Epstein and Bork, see Epstein's (1996) review of Bork's latest book in the *New York Times*.

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they do so in the name of many of the same political values that Bork advocates. Nor are they alone; many other libertarians have explicitly rejected Bork's reasoning. For instance, Stephen Macedo, wrote an entire book, *The New Right v. the Constitution,* criticizing Bork's constitutional theory (Macedo 1986). Unlike Bork, Macedo embraces the Court's recent decisions protecting personal rights. He just wants the Court to extend those protections to economic rights as well.

Moreover, two of the best-known conservatives on the bench today, Justice Antonin Scalia and Judge Frank Easterbrook, have argued against originalism as an approach to *statutory* interpretation. They advocate a rigorous adherence not to the original intent but to the words of the text. Although many (especially their critics on the Left) portray this radical textualism as a variant of originalism, it is not. Indeed, Scalia and Easterbrook explicitly developed their approach as an alternative to intentionalism.[2] Contra Bork, they argue that because the original intent of a collective body is inaccessible (if it even exists), originalist judges can pick and choose from among the detritus of politics for evidence supporting their policy preferences. Under these conditions, the only way to constrain judges is to restrict them to the words of the text. Any other materials will give them a de facto license to legislate. Although Scalia and Easterbrook couch their arguments with reference to statutes, it would seem that these same arguments would apply even more directly to the Constitution.

And, of course, there is Posner. A self-described "classical liberal" who takes his "stand with the John Stuart Mill of *On Liberty*," Posner seems to fit any sensible description of conservative (Posner 1995, 22). Yet, throughout his writings, Posner has also argued for a pragmatic approach to interpretation. Moreover, in contrast to Bork and Bostan, he argues that pragmatism is the interpretative approach most consistent with his political vision! In making his argument, Posner does not, as Bostan suggests, claim that judges are free to do as they please.[3] Instead, he argues that they should pay attention to the consequences of their decisions. He admits that when they do so, they might often decide to follow Bork and practice originalism. However, he believes that sometimes they should (or must) eschew originalism and take other factors into account when reading the Constitution. He wants them to do so openly, not furtively. And if they base decisions on consequences, he wants them to consider real consequences, not simply those cooked up in the judge's chambers.

2. For a more thorough discussion of their position, see Eskridge (1994, 41–47, 224–236) and the articles cited therein.

3. Posner's position is far too subtle and complex to be summarized here; readers who want more than a caricature should read his books for themselves.

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Thus it appears that, *as a matter of fact*, Bostan is wrong to say that originalism is the only interpretative strategy acceptable to conservatives. Plenty of respectable libertarians disagree with Bork, and therefore with Bostan.

Is Interpretation Just an Obsession of Effete European Intellectuals?

Over and over throughout his article, Bostan, following Bork, claims that Posner is wrong, that it is really easy to interpret the law. To interpret is, he tells us, "to attempt to discern the intent of the author." This definition, he says, is clear to "everyone else in the world, save the academics influenced by...deconstructionsists." Thus, he concludes, by treating interpretation as a difficult process, Judge Posner has (perhaps inadvertently) joined forces with those who claim that since texts offer no guide, judges are free to read their own preferences into the law. And whatever it means to have rule of law, it cannot mean "rule at the whim of judges."

This argument sounds sensible, but is it correct? Are trendy followers of the latest fads in recondite European literary theory really the only people who find interpretation difficult? Does worrying about interpretation force one to accept the radical skepticism of the deconstructionists? Well, actually, no. A quick look at history reveals that concern over interpretation is neither new nor alien. Since before the founding, Americans have discussed interpretation. Moreover, their discussions reveal lots of reasons to reject the commonsense view of interpretation touted by Bork and Bostan.

One of the first Americans to worry publicly about legal interpretation was James Madison: in *The Federalist* no. 37, he defended the Constitution against charges that it was vague and incomplete. He argued that because the world is complex and we are relatively ignorant, those who draft and ratify legal documents simply cannot foresee and anticipate all of the contingencies to which the text must apply. Even if they could, their reliance on language, which is necessarily imprecise, would prevent them from always being clear. As a result, Madison reasons, "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" (Madison, Hamilton, and Jay [1788] 1987, 245).

Madison may have been the first American to worry about these things, but he was hardly the last. In 1880, Francis Lieber, a noted defender of limited government, wrote *Legal and Political Hermeneutics: or Principles of interpretation and construction in law and politics.*" In it, he noted that when writing laws, we must always "leave a considerable part of our meaning to be

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found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey" (Lieber 1880, 20).

More recently, many students of American politics have questioned the Bork/Bostan equation of interpretation and intent. They ask whether it makes sense to talk of a collective—say, the people who drafted and ratified the Constitution—as intending anything. These skeptics argue that only an individual, such as the author of a book, can have an intention. In their view, to speak of the "intention" of a group or of the "author" of the Constitution is to misuse the words *intention* and *author*. Their logic is simple: what happens in groups is politics; that is, a group of people with diverse goals and beliefs search for a compromise that will satisfy the procedural requirements of their group. The result is likely to be contingent (they could have reached some other decision) and a real compromise (they could agree on some outcome that no single one of them actually wanted.) To complicate matters, the members of the winning coalition may even disagree among themselves over what exactly they agreed to.

Rejecting the analogy between collective choice and that of individuals does not imply that political decisions are incomprehensible or meaningless and, consequently, that judges are free to read statutes as saying whatever they want them to say. Rather, it suggests that to understand the choices of politicians we must delve deeply into their strategic environment. Only after doing so can we understand what they wanted and what they had to do to get others to go along (however grudgingly) with them.

The basic argument—that collectivities can't have intentions in the same sense as individuals—has been made in many ways by many people, as diverse and distinguished as Learned Hand (1952), Kenneth Arrow (1963), James Buchanan (1954), and William Riker (1982). Granted, Arrow calls himself a socialist. But Buchanan is, and Riker was, a libertarian. And they were making this argument long before Jacques Derrida became prominent.

So What Did the Founders Intend?

Suppose we decide to follow Bork and take original intent as our guide to the Constitution. Will we necessarily find the same intentions as Bork? As the skeptics point out, if the original intentions of the founders can be found anywhere, they can be found only in the politics of the founding. To understand the "intentions" of the founders, we need to ask what goals they had and then how those various goals influenced their decisions. To answer these questions, we need to dig deep into the history of the period, which neither Bork nor Bostan has done. Indeed, in chapter 7, "The Original Understanding," Bork's only source for the founders' intentions besides *The*

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Federalist is the snippets of the debates at the Constitutional Convention excerpted in a constitutional law text.[4] These hardly constitute what most of us would consider authoritative evidence of original intent.

Looking at history reveals that the founders had much more complex goals than those attributed to them by Bork.[5] As he suggests, those who supported the Constitution agreed that the United States needed a new national government, one that had more power than the government created by the Articles of Confederation. At the same time, they disagreed among themselves about how that government ought to be structured. Most of their disagreements sprang from their recognition that such a government was a mixed blessing—in addition to making them all better off, the government might also become a tool by which some could make themselves even better off at the expense of others. Naturally, their views about whose fears were justified and whose unjustified reflected the diversity of circumstances across the nation. Those from small states worried about exploitation by those from large states. Those from commercial areas worried about exploitation by those from agricultural areas. And those from slave states worried about exploitation by those from free states.

Given these worries, the delegates at the convention had to make a series of compromises in order find a Constitution that reassured everyone. As a result, the Constitution reflected not a coherent vision of an ideal government but a series of contingent decisions. The need to compromise explains such seeming inconsistencies as the Constitution's guarantee of slave owners' right to pursue runaway slaves and the simultaneous prohibition of slavery in the Northwest Territories. This juxtaposition makes sense once we realize that the Constitution was not the work of a single person but of a collectivity in which everyone gave up something in return for something else. The extent of the compromises also explains why, in September 1787, Madison told Thomas Jefferson that the Constitution created by the convention was a failure because it could "neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts against state governments" (quoted in Rakove 1996, 197).

Tracing out the intentions of the founders is even more difficult once we consider the politics after the convention.[6] How are we to tease out what exactly those who voted for the Constitution intended? The voluminous propaganda on both sides does not help, because it displayed a multitude of

4. The sources for that chapter are cited in Bork (1990, 387–89).

5. The literature on the founding is vast. For a recent account that stresses the role of politics in shaping the founders' rhetoric and decisions, see Rakove (1996).

6. In addition to referring to Rakove (1996) readers should consult Riker (1996), which analyzes all of the surviving literature from the ratification campaign.

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intentions. Which of these did the voters find convincing? We may never know. And what are we to make of the fact that, after violently opposing the Anti-federalist proposal for a Bill of Rights during the first part of the ratification campaign, the Federalists switched their views and proposed a Bill of Rights at the end of the campaign? This switch means that those who voted at the end were considering a different document than those who voted in the beginning. How did this change affect intentions?

To further complicate matters, after the ratification the Federalists themselves split up, forming the first two political parties. In his book, Bork makes it clear that his sympathies lie with the Hamilton wing of the Federalists against the party of Jefferson and Madison. Yet it is not clear why, except that he agrees with them on matters of policy.

These difficulties in parsing the original intentions of the founders are not due to the pernicious influence of French literary theorists. Quite the contrary: they are simply a consequence of politics. Politics is necessary only when people disagree over their joint ventures and therefore need some method of reconciling differences if they are to work together. Under these conditions, should we expect them to adopt the views of any single individual?

The centrality of politics to the founding does more than complicate our search for intentions. It also raises some serious moral questions. How are we to deal with the influence of considerations that we see as illegitimate, such as the desire to placate slave owners? Clearly because of the log-rolling and vote trading, slavery was implicated in much of the Constitution. Why should we respect intentions that included protecting slavery? And if we want to purge intentions of slavery, how exactly do we do so?

What Was the Original Intention of Due Process?

Bostan tells a story in which we have been led off the path of constitutional government by judges who see themselves as unconstrained by the Constitution. As authority, Bostan cites Bork, who devotes several chapters to an explication of the low points of American constitutional history. Much of this history focuses on the interpretation of the due process clauses. Bork starts his tour in 1847 with *Dred Scott*, in which he says the Supreme Court invented the substantive interpretation of due process. From there, Bork moves on to *Lochner*, a 1905 decision in which the Court usurped legislative power by striking down a New York statute regulating the bakers' work week. He ends in the present, with *Roe v. Wade* and its progeny, which set the courts up as arbiters of abortion policy.

In telling this story, Bork relies on the textbook treatment of *Lochner*. That treatment errs on several counts. First of all, it misreads what the

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Court actually did in *Lochner*. The Lochner majority did not, as Bostan suggests, treat the Constitution as "a living document" that they were free to interpret as they pleased. Rather, they thought that they were applying hallowed ideas about what it meant to give someone due process. Like Bork and Bostan, they believed in constitutional government and did not think that judges should simply read their views into the Constitution. But unlike Bostan and Bork, they believed that due process meant more than proper procedure. In particular, they believed that a statute was not law simply because it was passed by a majority of both houses of the legislature and signed by the executive. They thought that a statute had to meet a variety of other criteria—it had to be prospective, it had to be of general application, *and* it had to serve a public purpose. A statute such as the one at issue in *Lochner,* which benefited a small group—people working in bakeries—didn't fulfill the public-interest requirement.

In interpreting due process this way, the *Lochner* justices were not, as the textbooks suggest, acting without precedent. The textbooks tell us that the expansive reading of due process was invented sometime in the mid to late nineteenth century by activist judges who needed to justify reading their policy preferences into the Constitution. More recent constitutional histories of due process show that this history is itself an invention, created by Progressive commentators who disapproved of the Court's use of due process to strike down regulatory legislation. To bolster their case, the Progressives charged the Court with ignoring history in order to read its values into the Constitution. In adopting this line, Bork and Bostan ignore the findings of those historians who have recently gone back over the constitutional history of the early Republic.[7]

These historians show that when the *Lochner* justices attributed their reading of due process to their ancestors, they were obviously not deluded. To support their position, they could point to many precedents. Contrary to Bork, this interpretation of due process was not invented in *Dred Scott*; rather, *Dred Scott* was simply the first time the doctrine was used by a federal court. The true lineage of *Lochner* runs not through federal courts but through state courts. It includes *Wynehamer v. New York* (13 N.Y. 378 [1856]), in which the New York State Court of Appeals struck down an 1854 law prohibiting the sale of liquor on the ground that banning the sale of liquor already on hand was a retrospective act; *Hoke v. Henderson* (15 N.C. 1 [1833]), in which the North Carolina Supreme Court held in 1833 that the legislature could not appoint Henderson to a life term as clerk of a county court and later open the job to election; and *North Carolina v. Foy* (5 N.C. 58), in which the North Carolina Court held (in 1805!) that the legislature

7. For examples, see Ely (1992), Gilman (1993), or Mendelson (1956).

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could not change the charter of the University of North Carolina. In these and many other cases, state court judges interpreted the due process clauses of their (state) constitutions as requiring more than proper procedure; indeed, they all rejected the view that procedure was enough to turn any legislative order into a law. In doing so, they established the interpretation of due process drawn on by the *Lochner* justices (an interpretation, I might add, that Bork's anachronistic exclusive focus on the federal courts leads him to miss completely).

Ironically, Bork and Bostan could also invoke this line of cases to support their critique of *Lochner*. To do so, they could point out that the interpretation of due process was never unanimously accepted. Due process was, in the language of postmodernism, "always contested."[8] For every attorney arguing that a particular regulation violated due process, there was an attorney arguing the other side, and many judges who agreed. For example, the dissenters in *Wynehamer*, like Bork, argued that the majority relied on "strained and unwarrantable construction" of due process in striking down New York's liquor law (Johnson, in *Wynehamer,* p. 466). They believed that this interpretation forced the court to make decisions about the wisdom or expediency of statutes, decisions that the state's constitution left to the legislature. From their perspective, the majority's reading of the due process clause forced the courts to violate the separation of powers by usurping the powers of the legislature.

Thus, a look at history reveals several truths. If Bork's stories are meant to illustrate how to ascertain original intent, they fail. His approach to finding intent leads him into two separate errors. First, by reading his nationalistic constitution—that of Hamilton and Marshall—back to the founding, he misses the real federalism of the early Republic, a federalism in which much of the constitutional action was in the states. As a result, he misses the complexity of the truth about due process. Second, perusing the state courts, no matter how close we get to the founding, we find people arguing both sides. If by original intent we mean what really happened, then no amount of historical research will allow us to recover the "original intent" of due process. There simply was no such thing. Not because, as the deconstructionists would have it, there are no intentions, but because, as the skeptics warn us, people often differ in their intentions.

At this point, an originalist might be tempted to ask, "So what?" All that's been proven so far is that Bork isn't a good historian. Well, an originalist might argue, Bork's a busy man, who can't be expected to keep up with the latest findings of historians. Besides, his examples are meant as

8. The dissension was so deep that the New York Court of Appeals' opinion in *Wynehamer* was more than 100 pages long and included contributions from seven of the court's eight justices.

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illustrations, not as gospel truth. What matters is that judges adopt his approach and use it to guide their constitutional decisions, not whether they reach the same results that he did.

It is time to call the originalists to the stand, to hear what they have to say for themselves.

How Originalist Is Originalism Anyway?

The implicit promise of originalism is the offer of a principled and objective approach to interpretation. By sticking to a clear and limited set of authoritative sources, originalist judges avoid imposing their preferences on their decisions. Yet a closer examination of the works of two of the most prominent originalists, Justice Scalia and Judge Bork himself, shows that, at crucial moments, they shrink from consistent application of their own principles. Instead, they opt for the very methods they condemn in others.

Perhaps the most striking example of this inconsistency comes in Bork's own discussion of the reapportionment case *Baker v. Carr*. In deciding *Baker*, the Court found that the equal protection clause of the Fourteenth Amendment required that states apportion legislative districts so as to give one man one vote. In *Tempting*, Bork argues that an originalist would have decided Baker under Article 4, sec. 4, which guarantees each state "a republican form of government." According to Bork, the guarantee clause was the way to go "precisely because a situation in which the majority is systematically prevented from governing is not what the Founders meant by a republican form of government" (Bork 1990, 86). Bork offers no evidence for this claim. Yet it is hard to square with what we know of the founders' decisions. For instance, the sole purpose of the Senate is to ensure that voters are not equally represented in the national government; those from small states are systematically over-represented in the Senate. Moreover, many states had extremely restricted franchises and unbalanced representation. Thus it seems that Bork's reasoning, though perhaps sound, is not originalist.

Bostan's uncompromising originalism has also been implicitly criticized by Justice Scalia, who is among the most prominent of those calling for a return to original intent. But instead of celebrating intentionalism, Scalia calls it "The Lesser Evil," one that he finds "a bitter pill" "that seems too strong to swallow" (Scalia 1989, 861). Moreover, he does not think that judges should restrict themselves to implementing only original intentions. Instead, he would have them start with those intentions and deviate from them only for good reasons. To illustrate his approach, Scalia considers the case of flogging and branding. Suppose, he asks, that historians could show that these were not regarded as cruel and unusual punishments when the Constitution was ratified. He asserts that even so, no "federal judge—even

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among the many who consider themselves originalists—would sustain" such laws today (861). But instead of denouncing these judges for abandoning constitutional government, Scalia applauds them. He further argues that such deviations from originalism are a practice that "any espousal of originalism as a practical theory must somehow come to terms with" (861). So, when push comes to shove, Scalia calls for a "faint hearted" originalism, a position that Posner might call "pragmatic" originalism (862).

Scalia is not alone in urging us to moderate our originalism when it is sensible to do so. In 1978, well before Derrida had corrupted the American legal academy, Bork himself raised many of the themes I have mentioned, in his book *The Antitrust Paradox*. There, he advocated a radical reinterpretation of the antitrust laws: he claimed that those laws had a single goal, the maximization of consumer welfare. He argued that because such maximization was *the* intention of the law, judges ought to put it into effect in their decisions. He adduced a variety of evidence, including legislative history, to support his claim.

Bork's most radical factual claim—that Congress intended the antitrust laws to maximize consumer welfare—has not fared well. A variety of scholars, many of them as enamored of free markets as Bork, have reviewed his analysis of the political economy of antitrust. Few, if any of them, support his claim. For example, Gary Libecap (1992) argues that the laws were the work of a coalition made up of populists who simply hated big business and various small, local producers who were hurt by the rise of big businesses serving national markets. Others, such as Christopher Grandy (1993), argue that Congress considered and then rejected Sherman's proconsumer approach. In its place, Congress adopted an approach that focused on the behavior of producers.

It is not clear how these factual critiques affect Bork's argument, because Bork states throughout the book that the "intention" he affirms may have little to do with what actually happened in Congress. At one point, he declares that "the problems and artificialities of attributing an intent to a sizable body of men are well known" (1978, 56). In the next sentence, he asserts that courts should ignore these problems when reading statutes. Why? In his words, although "the concept of legislative intent may be artificial...it is also indispensable" (57) And why, if it is artificial, is it indispensable? Because, it turns out, "even in statutory fields of law, courts have obligations other than the mechanical translation of legislative will" (72). Among these are a "responsibility...for the integrity and virtue of law" (72). As he expresses it, they must use the fiction of intent to make sure that law has "coherence" (57).

So much for the *original* intentions.

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Who's in Charge Here?

Bostan and Bork worry about how judges read the Constitution because they think that it affects the real world. Like many conservatives, they believe that autonomous judges have taken over our government and forced it to do many things that it wouldn't otherwise do. Is this belief true? Can judges frustrate the will of the majority for a long time? Or is their power over policy limited by their position in the political system?

Certainly, the view that judges get to make policy contrary to the will of the political branches is popular, both in the academy and on the street. However, both recent scholarship and common sense suggest that we should not exaggerate the extent of judicial independence. Common sense tells us that over the long run, judges can not impose policies that are contrary to at least some politicians. In Bork's words, "The Court can do what it wants, and there is almost no way to stop it, *provided that it has a significant political constituency*" (Bork 1990, 77). Under these conditions, it seems curious to attribute policy solely to judges, as they can affect policy only with the approval, at least tacit, of some other branch. This observation doesn't mean that courts are powerless; they aren't. It just means that they aren't omnipotent.

Recent studies of courts point to the idea that politicians do not have to wait for the long run (when judges, like the rest of us, are all dead) to bring recalcitrant judges to heel. For instance, William Eskridge (1994) shows that politicians pay much more attention to judicial decisions interpreting statutes than folklore suggests. By examining committee hearings and reports, Eskridge was able to find evidence that Congress has not been asleep at the wheel. It is constantly monitoring judicial decisions. By examining subsequent decisions, Eskridge was able to find evidence that the judges pay attention to Congress, modifying decisions that displease Congress. Similar, if weaker, processes are probably at work for the Constitution.

That judges pay attention to politicians does not vitiate Bork's claim that the judicial decisions are out of sync with the views of a majority of Americans. After all, what politicians decide and what the majority of Americans want are not always (perhaps not often) the same. The institutions of governance—bicamerality, the committee system, presentment—all combine to distribute political power unevenly. These distributions allow minorities to get policies they prefer. (Of course, it may be that we are all in some minority that gets what it wants; allowing such giant logrolls may in fact be the point of these institutions.) If judges can find some powerful friends, politicians who are on their side and are powerful enough to protect them from other politicians, then their decisions will stand, regardless of their consistency with majority views.

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This account of American politics suggests that majorities are frequently frustrated, that our institutions tend to favor some minority. So even if judges followed Borkean precepts, policy would still very often differ from what a majority wanted. Thus, it seems that Bork's promise that removing judges will empower majorities is a chimera. Reforming the judiciary would simply change the minority served.

This result should not surprise us. After all, the Constitution was drafted and ratified by people who believed, as Madison told George Washington before the Convention, that what America needed was a Constitution that would "curb the aggression of interested majorities on the rights of minorities and individuals" (quoted in Rakove 1996, 51). Perhaps a government that truly represented the will of majorities would be failing the founders' intentions.

What Is to Be Done?

In the end, it is hard not to see the Bork/Bostan defense of original intent as an exercise in unintended irony. Throughout his article, Bostan invokes Edmund Burke to justify his defense of originalism. He affirms that only someone who understands the Burkean argument about the superiority of tradition and evolution over design and legislation can understand why we should allow ourselves to be ruled by the dead. Yet it seems that those who appreciate Burke's argument will find a better friend in Posner than in Bork. After all, it is Posner, not Bork, who bases his prescriptions on descriptions. Over and over, Posner argues that pragmatism is the practice that judges have evolved to deal with the complicated interpretative decisions they face. Bork and Bostan, on the other hand, like Hayekian legislators, are always telling us what to do, arguing that their designs are better than evolution. Moreover, unlike good Burkeans, they get their history entirely second and thirdhand: Bostan relies on Bork, and Bork relies on what he's read in textbooks.

If the dispute between Bostan and Posner were simply a matter of academic bragging rights, these peccadilloes and inconsistencies would be amusing, but nothing more. However, as Bostan and Bork constantly remind us, much more is at stake. Judges and courts are important players in the modern political economy, so important that we cannot understand our world unless we understand them. But to understand their impact, we cannot simply study them in isolation, nor can we take their self-descriptions at face value. Instead, to understand what they are up to, and why it matters, we need to consider them in their legal, political, social, and economic environment because much of what they do depends crucially on their reaction to this environment.

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Bork and Bostan offer us little insight into judges and their world. Their model of the political economy is abstract and arid, based on a simplistic view of the real world of politics and law. Readers who want to deepen their understanding of law's place in that world will have to look elsewhere. For my money, they would do well to turn to the recent books on courts by Posner and (despite its title) Eskridge.[9] Both authors deal with judges in their strategic environment, asking what the judges want and what constrains them in their quest. To answer these questions, both turn to the real world, using detailed discussions of actual events to support their theoretical claims. As a result, open-minded readers are likely to learn much from these books.

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9. And those who are interested in original intentions would be better served by the recent books by Rakove (1996) or Riker (1996) or (despite Bostan's canard in footnote 3) by any of the articles by Suzanna Sherry, such as Sherry (1987), than by Bork.

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The Quickening of Social Evolution

Perspectives on Proprietary (Entrepreneurial) Communities

SPENCER H. MACCALLUM

Years ago I read a translation, supposedly true, of a very early Egyptian sequence of hieroglyphs that said in effect that the world was going to the dogs. After listing a number of lamentations, including the disobedience of young people and how they no longer respected their elders, it ended with the observation that "everybody's trying to write a book."

So it always seems to every generation that the world is disintegrating. There's a good reason it should appear that way, a very understandable reason. The world is in flux, with new forms always evolving out of the old. We are familiar with the old patterns because we have lived them, but not with the new, emerging ones, because they have never been part of our experience. Consequently we rarely recognize the new patterns that are in process of forming. Knowing only the patterns that were, all we see in change is disintegration—patterns being lost. This is particularly easy to see in language,

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in the losing efforts of pedagogues to train the young to speak "grammatically." But the same phenomenon occurs in all areas of our experience. So the disintegration lamented by the early Egyptians and probably every generation before and after is, for the most part, appearance only. It could just as well be called *integration* rather than disintegration, except that we don't have the evidence before our eyes. We must take it on faith.

The same is true of societal change—the broad sweep of human social evolution. Only evolutionary change isn't gradual but seems to be punctuated by abrupt shifts from one plane of comparatively stable forms to the next—always building on what went before. It's like a stair consisting of treads and risers. The treads are long eras of comparatively stable institutions, whereas the risers are periods of turbulent change and instability that must be negotiated before the next broad tread is reached, just as the spawning salmon must negotiate the steep rapid or rocky waterfall before reaching the next comparatively calm stretch of river. The salmon leaps and falls back, leaps and falls back, but each time it progresses farther and falls back not quite as much, until it negotiates the waterfall.

Mankind has been negotiating a waterfall for at least nine thousand years—an exceedingly brief period in the eons that man has occupied the earth. His leaping and falling back again is the all-too-familiar pattern recounted in history textbooks, the seemingly endless rise and fall of civilizations.

The previous broad tread on the stair, the calm stretch of water we have now pretty much left behind us, was that of tribalism, characterized by dependence on systems of kinship status for sorting out all the customary roles and activities in society. Now relying less on kinship, humankind is experimenting with a wide assortment of contractual relations. Sir Henry Sumner Maine was sound when he observed more than a hundred years ago in his classic study, *Ancient Law*, "We may say that the movement of the progressive societies has hitherto been a movement *from status to contract*" ([1861] 1986, 141).

I believe we salmon have now reached the point where, as we leap, we can just begin to see over the top of the falls or rapids to the next calm stretch in our river. We can just begin to discern and make some judgments about what the nature of human society will be as it stabilizes once again on the next broad tread of evolution. I'm going to take the risk—I don't think it's a very great one—of making some predictions about human society as it settles into comparatively smooth swimming in the twenty-first century—and probably for quite some time beyond.

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Tribalism versus Today's Nation-States

Consider first where we've been. As an anthropologist, I've focused a good deal of my attention on tribal societies. In many ways the era of tribalism, as compared with today's world, was a golden age, to be exceeded only by what is yet in store for us. Tribal life, however, left much to be desired. Tribal man's technological proficiency was so limited that he was constantly at the mercy of nature. This limitation was particularly serious with regard to health; general life expectancy of less than thirty years barely permitted biological replacement. A second grave shortcoming under tribalism was that human social life coalesced, as it were, in antagonistic droplets scattered over the globe with little communication or cooperation between members of one and those of another. Opportunities were essentially limited to the circle of face-to-face acquaintances into which one was born.

Notwithstanding such serious drawbacks, tribal society had a positive side. Within each of those antagonistic droplets, social relations had an orderliness and sense of fair play almost incomprehensible to us today. Society consisted of small management units, quite human in scale, and relations among the members (at least among the men) tended strongly to be egalitarian, fair, and just. The headman of a village, for example, though he usually enjoyed more influence and prestige, exercised no authority over the person or property of anyone else in the village. He had the same authority *in kind* as that exercised by the humblest member. There was no conscription of persons, no taxation. Tribal society was consistent in this respect throughout. Freedom in the juridical sense is this: when one enjoys full integrity of his person and property, he is said to be free. Tribal society was free.

Let me tack a caveat onto that generalization. It doesn't include transitional forms on the boundary between tribes and states. When tribes cross that boundary and become states, they may retain many of their tribal characteristics for a long time. We know we're dealing with a state, however, when force has become institutionalized and is accepted as proper conduct within the group. In *The Art of Community*, I described the example of the Cherokee in 1761 forming themselves into a state (1970, 98–99). The moment of transition was definite, although many tribal characteristics persist to this day. The Cherokee fell within our generalization before 1761, but not after.

Modern society under the rule of political governments presents the reverse image of tribal society. Imagine humankind as a bird attempting to fly. Whereas under tribalism one of its great wings dragged on the ground, preventing it from rising into flight, now that great wing is up and the other drags. In science and technology we've made enormous gains; we've more

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than doubled our average life expectancy within a few generations and may do so again. We can seek opportunities for fruitful communication and exchange with other human beings virtually anywhere on the earth. That much is progress. But in our political life we have regressed. For example, 268 million people in the United States are ruled monolithically from the top, and their chief executive, a warrior (commander-in-chief of the armed forces), regularly exercises an authority that differs absolutely in kind from that exercised by private citizens in their day-to-day affairs. People have become ciphers, their individuality erased; our gains, even in science and technology, are endangered by the uncontrolled—and apparently uncontrollable—growth and spread of naked force.

The prospect of life under the rule of the nation-state is bleak indeed if seen only from the viewpoint of the disintegration of the institutions and lifeways we grew up with and know from our grandparents' accounts and from reading. But change, as I have noted, characteristically occurs not only *from* but *toward*. It has two modes, one quite invisible almost until we bump up against it. Patterns newly forming are not encompassed within our experience; hence we see only the disintegration that change brings. What *of* the future? Will human society ever get both wings aloft at the same time?

Past experience should reassure us that in the broad picture, at least, change is more integrative than disintegrative. This tendency is demonstrable, for in the long run if health were not more catching than disease—to use a homey phrase of my grandfather's—none of us would be here today. But happily we salmon have reached a point, almost at the top of our rocky waterfall, where we need not rely on philosophic conjecture alone. In our mind's eye, at least, we can begin to see over the top of the falls, and with that glimpse of the future we can begin to recognize and relate events happening all around us. We can begin to perceive fundamental evolutionary changes taking place in the structure and function of our social organization, changes so imminent that I predict we will soon bump against them.

The Change That Is Gathering Speed

How can such change be happening? Let's review some basics. Certainly one of the most significant differences between tribalism and modern society is man's vastly greater facility with numbers. The ability to manipulate numbers makes possible on the one hand the whole world of science and its applications and, on the other hand, that of commerce—both utterly strange worlds to tribal man. Facility with numbers is not by itself a sufficient cause, but it is prerequisite. Without it there could be no science or commerce; with it, given the right conditions, science and commerce will

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evolve. Science becomes possible because at bottom it involves comparisons of quantities, and every *ratio* is a number—hence the *ration-ality* of science. Likewise, commerce becomes possible, because it depends on numerical pricing and accountancy of debt, credit, inventory, and trades. Change in pricing coordinates the whole world of economic activity.

Science is not my focus here; it's not the dragging wing. The dragging wing is our interpersonal relations, and a fundamental part of those relations—the healing and growing part—is commerce. Do you remember the passage from the Psalm about how the stone that the builders rejected became the chief cornerstone? Commerce is that cornerstone. We appreciate it far too little, and we depreciate it far too much. Alfred North Whitehead once characterized civilization as the "victory of persuasion over force." He elaborated, saying "Commerce is the great example of intercourse in the way of persuasion. War, slavery, and government compulsion exemplify the reign of force" ([1933] 1967, 83).

Commerce developed as people learned to balance their accounts numerically, making it possible to do business with strangers—people of another lineage, clan, or village. Without numbers, which make it possible for every transaction to be balanced and complete, something is always left over on one side or the other. When dealing with familiars (the language under tribalism, incidentally, is that of *gifting* rather than buying and selling), that imbalance doesn't matter; over a lifetime or some similarly extended period of reciprocating it all evens out. With accountancy, however, every transaction can be complete in itself, and the parties can depart satisfied without any expectation of seeing each other again, necessarily. So for the first time we can do business with people we don't know. This capability dissolves the surface tension of the antagonistic droplets of tribal society and makes possible the worldwide system of reciprocal services that today gives us our very comfortable standard of living.

My interest here is not just commerce in any of the usual array of things we find in the market, but specifically commerce in land. We're all familiar with the growth of other kinds of commerce, but commerce in land has lagged behind in its development. One of the reasons for its lagging, perhaps, is that in Europe before the revolutions of the eighteenth century, land wasn't free to any great extent—at least not generally so—to become the object of commerce. It couldn't readily be bought and sold in the marketplace. That situation changed only when the revolutions brought about a separation of land and state. This change is not remarked upon in the history books, but it is arguably one of the most important events of modern times. Until it happened, land in western Europe was not free to be traded as other things were but was tied up in primogeniture and entail and was part of the administration of government. Only when the revolutions that

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swept through Europe divested the titled nobility of their political power and trappings *without divesting them of their land* could land become a commodity like other things.

The titled nobility as a class tended not to be entrepreneurial; they had previously been the government, and their ethic militated against their dirtying their hands with trade. (In her recent book, *Systems for Survival* [1992], Jane Jacobs clarifies beautifully why this ethic prevailed.) So commerce in land, a truly businesslike approach to land ownership, got off to a late start, and a slow start at that. Even today the vast majority of landlords carry on their business as a sideline to supplement, say, a pension or other retirement income and have little understanding of the business they are in.

The Business Rationale of Land Ownership

The business rationale of land ownership, as explained by Spencer Heath (1936), derives from the fact that public services—the things that we enjoy in common rather than separately and apart from one another, things such as streets, public safety, and other community amenities—are supplied to sites rather than to individuals, and individuals gain access to them through their occupancy of those sites. Thus owners of land, when they lease or sell sites, are the market purveyors of those public services. Only thus can such services be distributed as other goods and services are, through the conventions of the market place. Only through property in land can they be freely and equitably administered by *contract,* which is egalitarian in the free tradition of tribalism, instead of through favor and privilege, forced levies, the corrosive status relationship of ruler and ruled by whatever name.

This purely distributive function is the land owner's minimal role in society, for which he is recompensed minimally in either land price or rent. Traditionally landowners have done little more. In the entrepreneurial community, however, they are going beyond that minimal distributive function; here they produce the services they purvey, and their rewards are correspondingly greater.

Ground rents, then, represent the going market value of community services and amenities. But the owners of entrepreneurial communities are more than just passive recipients benefiting speculatively from such land values as may haphazardly arise, however important to society that distributive function may be. These owners are systematically generating land value by employing their land as productive capital.

For a model of how this contractual provision of public services even now is occurring, look at the shopping mall in its internal organization as a community of landlord and merchant tenants. The mall or, for that matter, any of the many kinds of multitenant income property in real estate, is

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smaller and more specialized than most of the communities we frequent, but it is a community nonetheless. It is divided into private and common areas, and the members have a clear arrangement for providing common security, utilities, planning and maintenance of the common areas, and other functions its continuity requires. Yet all of this provision is accomplished though a complex web of contracts without taxation or legislation. It is spontaneous order, arising out of voluntary relationships among the parties themselves.

The rationale for this spontaneous order is as follows: The proprietor of that *place* invests in improving it in ways that create an attractive human environment for people to transact their affairs. To the extent he succeeds, and no more, those finding it attractive will competitively bid up rents among themselves for the privilege of locating there. These rents, in turn, finance the public services in that place. Because such communities yield a revenue, they are self-sustaining; they need never become obsolete, like the ruins of Nineveh and Tyre. *Because they produce income*, someone is both willing and able to maintain them, to renovate them when necessary and even rebuild them to keep them competitive.

These *proprietary* communities, so called because they are freely offered in the marketplace by the organized owners of the underlying ground, are newcomers in the evolving world of business. Also called *entrepreneurial* communities, or "entrecoms," they appear in a thinner slice of recorded history, even, than recorded history represents of the total period of humankind's life on earth. They evolved a bit in the nineteenth century in a rudimentary way, as I've described in *The Art of Community,* but they began to blossom only in the twentieth century. Albeit still small and specialized, these multiple-tenant income properties are appearing as shopping centers; landlease communities of manufactured housing that have metamorphosed from mobile home parks; hotels and motels, some of which today, like the Ambassador City Jomtien in Thailand or Las Vegas' MGM Grand, accommodate more than 10,000 guests; marinas; office and research parks; medical clinics; large residential apartment developments; and combinations of all of these forms. The combinations are particularly significant because they represent departures from special-purpose in the direction of fully generalized communities.

Note that entrecoms include neither condominiums nor their close cousins, subdivisions with homeowners' associations, but consist exclusively of communities in which title to the underlying realty is kept intact and parceling is accomplished by renting or leasing.

The rapidity of this development is astounding. Consider the shopping center. Fifty years ago it was experimental; fewer than a dozen existed in the United States, and even the name had yet to be coined. Today there are over 40,000. Moreover, each now supplies for its tenants a significant por-

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tion of the community services formerly provided exclusively by local governments, services such as paving, streets, sewerage, parking, and security.

Theorists of Proprietary Community: Henry George, Ebenezer Howard, Spencer Heath

There is scarcely any theory to explain or support the proliferation of proprietary communities. Such theory as exists was developed over the last century by people outside of academia whose work and writing are little remembered: Henry George, the toast of the world in his day but now largely forgotten, died in 1897; Ebenezer Howard died in 1928; Spencer Heath in 1963.

Henry George, a truly remarkable economist, political scientist, and orator, made a major contribution at the end of the last century. He had distinguished predecessors, including among others William Ogilvie, Thomas Spence, Patrick Edward Dove, and the early Herbert Spencer (see Ogilvie [1782] 1970, Spence [1775] 1920, Dove [1850] 1910, and Spencer [1851] 1969). But none approached the forcefulness with which he publicized the idea that ground rents—revenues from land—constitute a "naturally ordained" fund for financing all public services. Unfortunately, the method he envisioned for applying the principle was for government to collect those rents, leaving the landowners out of the picture. Hence Georgist communities in theory would not have been proprietary nor in any sense competitive or entrepreneurial. His reliance on the coercive powers of government—his "going political"—probably accounts as much as any other single thing for his land argument having fallen into obscurity. Fred Foldvary's recent book, *Public Goods and Private Communities: The Market Provision of Social Services*, has only now, a century after George's death in 1897, begun to reintroduce into academic and public discussion the notion of funding public services with land rents.

Like Henry George, Ebenezer Howard, a practical and unassuming Englishman, was a social dreamer of extraordinary vision. Despite his modest personal means, he founded England's Garden City movement and was responsible for the successful development of two entire cities outside London on what had been rural land. Today Letchworth and Welwyn are prosperous cities financed entirely by ground rents, and to my knowledge not a penny of taxation has ever been levied in either. On the contrary, the British Labor government after it had nationalized both following World War II—a private company owning a town being entirely out of line with the political ideology of the time—was embarrassed by the flow of income it found itself receiving. Not being entrepreneurially inclined, it didn't know what to do with the money. Howard and George didn't see eye to eye personally. But

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Howard, who steered clear of government, considered his wholly nonpolitical "garden cities" the practical application of the Georgist ideal.

Strangely, Ebenezer Howard's work has fallen even more into eclipse than Henry George's. His principal innovation, financing the community from private land rents and thereby dispensing altogether with local taxation, has been forgotten in the literature of city planning; his book *Garden Cities of Tomorrow* ([1902] 1965) is one of those pedestaled and unread classics.[1] The purely physical innovations of his cities, on the other hand, such as design and density control, functional zoning, and the greenbelt, are remembered and widely imitated. But what Howard himself considered his lasting contribution to civilization is worse than ignored; it is simply forgotten. It was considered too radical, perhaps, to warrant emulation.

Howard was uncommitted as to whether proprietary communities should be entrepreneurial ventures or, alternatively, nonprofit trusts. But to help secure support and backing, especially from the Fabian Socialists, who, including George Bernard Shaw, were among his foremost boosters, he chose the latter form. His accountant, C. B. Purdom, writing in later years, attributed the slowness of the two cities in getting off the ground and the general lack of vision of their subsequent management to the absence of any provision for equity in the ventures (1949, 345). The resulting mediocrity may explain why the two cities have made little history. They have not done much more than provide an attractive and successful living environment for 80,000 people! As one supporter plaintively wrote

> Howard and his associates made one propagandist mistake in siting Letchworth and Welwyn—building them in England within an hour's journey of London. One should have been built on some remote island like Mauritius, and the other in the Soviet Republic of Uzbuzchakistan. Planners and journalists would then have visited them and written them up, and we should have had lots of illuminating books on them. Also we should be excited about them as wonderful achievements, and be wanting to know why we can't have new towns of the same type in Dear Old Stick-in-the-Mud England. (Osborne 1946, 36)

Spencer Heath was an engineer, manufacturer, horticulturist, poet, and ultimately philosopher of science and social thinker who did his main work during the years of Roosevelt's New Deal, an age of ascendant government in America. That he was not an academic and was "politically incorrect" may help explain why his social theories gained little hearing. The turning point

1. The lesser-known first edition, which I prefer, was published in 1898 under the title *Tomorrow: A Peaceful Path to Real Reform.*

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in his thinking occurred in the early 1930s, when he concluded that proprietorship was nature's alternative to politics. In 1936 he self-published a monograph titled *Politics versus Proprietorship*. That and his chief published work, *Citadel, Market and Altar* (1957) are now out of print.

Spencer Heath's genius was to see that Henry George's program, which would remove all taxes from private production and finance public services entirely from ground rents (hence the name "Single Tax"), was profoundly in the landowner's interest. For if private production were freed of all taxes and restrictive regulations, productivity and incomes would soar, sites and resources would come into high demand, and rents would rise more than enough to defray the costs of government, leaving a margin of profit to landowners. He believed enlightened real estate interests ultimately would take the lead in removing taxes from private industry and assuming full responsibility for the costs of government. Heath coined the phrase "proprietary community." He completed Howard's concept by providing it with an entrepreneurial engine. By envisioning landowners assuming all the functions of government as we know it, he anticipated the public business becoming private business, a wholly new field for free-market experimentation and investment.

Foreseeing the Evolved Society

If we paint pictures of the future with a broad-enough brush, we can often cover the entire subject and find ourselves "right on." The more interesting predictions, because more difficult, get into specifics. I'm confident in predicting that proprietary community administration will replace political, and although timing isn't to be construed as part of the prediction, I wouldn't be surprised if it happened within the lifetime of many of us living today. The broad picture I envision—timing aside—is one in which financially self-sustaining communities will have become the norm—entrepreneurial enclaves with leaseholds instead of subdivision lots as the land tenure of choice for commercial and residential uses alike. All taxation and burdensome licensing, regulation, and other restrictions on enterprise will belong to the past. The state will have withered away, to borrow Marx's vivid image, its functions progressively better served in an ever evolving marketplace.

More detailed predictions are apt to carry me onto the shoals. Mindful of the danger, however, I am willing to venture answers to the following frequently asked questions.

1. What will happen to national boundaries?

They will become relics of the past, and this outcome is safely within my broad prediction. Should it prove convenient, boundaries between federa-

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tions of autonomous communities might arise following natural features such as rivers or mountains or cultural, linguistic or other interfaces.

2. Will the communities be all alike?

The variety will far exceed anything seen today, as communities will specialize to appeal to every taste, each discovering its ecological niche in the overall economy. Entrecoms differ greatly even today. Take as a single example the hotel, and count the number of different types. We find resident, resort, transient, "extra-transient" ("hot-pillow"), ethnic, dormitory, casino, budget, and others, with subcategories and hybrids of them all.

3. How big will these communities be?

Size will be determined by market considerations. Except for highly transient and some other specialized situations, I suspect that, as in tribal society, "optimal size" for administrative purposes won't be larger than the largest feasible "face-to-face" community, that is to say, not more than a few thousand persons, in which the manager can recognize members at sight. At successive levels, such entrecoms will cooperate as chain or franchised businesses do today to accomplish functions more effectively handled at higher levels. Customers' preferences will be the determinant. Some communities will clump up together, resulting in high-density urban aggregations of population, while others will be rural. Inevitably there will be elaborate composites of communities of different types and specialties, smaller ones sublet within the matrix of progressively larger ones—just as different kinds of atoms are mutually attracted to form complex molecules, and those molecules cells, and so forth.

4. Will future society be democratic?

The word *democracy* has two meanings. It can mean individual autonomy where all are equal in their authroity over their own persons and property, or it can refer to a political decision-making process in which the outcome is determined by voting. Jonathan Swift is said to have commented on the latter kind of democracy, wryly saying that "some people have no better idea of deciding right from wrong than by counting noses."

Political voting, though its intent—and very often its effect—is to moderate autocracy, nevertheless entails people ganging up against one another and is altogether different from making decisions based on property rights. Rule by a voting majority can be as oppressive to the losers as the most autocratic regime. In a condominium or any other subdivision in

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which the residents have organized to make decisions through voting and thus have departed from purely proprietary processes, therefore, we find the seed of the state. Subdivisions with owners' associations contrast starkly with entrepreneurial communities, and the two ought never be confused.

The homeowners' association is a policing arrangement organized to enforce the restrictive covenants in the deeds. The entrecom on the other hand seeks to foster an attractive living environment that will draw new patronage and keep its existing patronage. These goals differ greatly, and the psychology varies accordingly. In the one the residents are quite literally subjects; they are subject to the deed restrictions and must be made to comply. In the other they are customers. The owners' association seeks compliance and must be rigid; the entrepreneur seeks patronage, and therefore must be flexible and accommodating.

Although owners' associations are often called democratic, on the grounds that decision making is accomplished through voting, entrecoms are no less democratic, inasmuch as the residents vote each time they pay their ground rent. These usages reflect the two different meanings of the word. Both subdivisions and entrepreneurial communities doubtless will coexist well into the future, and therefore both kinds of democracy. I believe without a doubt, however, that voting democracy will become the exceptional rather than the prevailing form. The reason is not merely that leasehold permits flexible and continuous redevelopment even to the layout of the streets without infringing property rights—a definite advantage in a world of increasing technological change. A more fundamental reason is that leasehold permits the entrepreneurial community to operate for profit whereas the subdivision cannot. This feature affords an important measure of protection against arbitrariness not present in the subdivision arrangement (MacCallum 1996, 18, II.D.6 and footnote 6), and it brings an entrepreneurial dynamic to the provision of public services that is wholly lacking in subdivided communities.

5. What about people who prefer subdivision lots to leaseholds?

The idea of owning their own plot of land presently appeals to many people, and where there is a demand, the market usually finds a way to provide. Some communities doubtless will offer approximations to subdivision through the use of long-term leasing, including perpetual leases, paid-up leases, and life estates. But in any case fee-simple properties will probably be available in most parts of the world for as long as anyone cares to look ahead.

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6. Will this be like feudalism?

Not feudalism, but *manorialism;* the two are often confused. Manorialism is a form of agrarian social organization, whereas feudalism is a military order imposed on manorialism, often by conquest, which then becomes largely fused with it. Norman feudalism was imposed on manorial England after 1066.

If the question is whether entrecoms resemble manorialism, the answer is yes, essentially. But manorialism, though structured as proprietary communities, could not progress because it was before its time.

Sol Tax, a teacher of mine at the University of Chicago, did fieldwork in the highlands of Guatemala and wrote a book called *Penny Capitalism* in which he described a system of Indian markets that was purely laissez-faire in the best tradition of Adam Smith and apparently had been since pre-Spanish times. The question he asked was, If these people have such freedom, why aren't they rich? The answer he suggested was that significant wealth creation takes much more than just freedom from constraints. It requires the complex institutional development of a market society. In Guatemalan native society the modern firm had not yet developed, nor had any corresponding productive technology. The unit of production was the family.

The distinction between firm and family is crucial. Firms are impersonal in the sense that they have specialized, well-defined goals, recruit on the basis of ability and experience, and are single-mindedly market oriented. Families, on the other hand, have necessarily complex agendas in which, for example, recreation might rank high. They can neither recruit or fire except in a limited way through marriage or divorce or by recognizing extended family ties. They must accommodate old Aunt Flora and irascible Cousin John.

Manorial arrangements were family ventures and very unbusinesslike from today's perspective. The modern entrepreneurial community can accomplish infinitely more than the medieval manor because of its more evolved nature and because it operates in an altogether different environment, a competitive global economy of specialized firms including interlocking and supportive financial and service institutions of every description. We would make a mistake by attempting to understand the whole of the entrepreneurial community in terms of the medieval manor or the tribal village.

7. What will keep the managers of entrcoms from becoming tyrants?

Look around you, and what do you see? If we searched the records of the hundreds of thousands of entrecoms extant today, we might find some horror stories, but they would be exceptional and short lived. Years ago I

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conducted a field study of what kinds of dispute situations arise in mobile-home parks and shopping centers and how they are handled (1971). In the course of the study I collected many entertaining case histories, but none was a horror story. The fact is that businesspeople for the most part look out for their customers. That's why they remain in business. If they get lax, someone else may buy the business and restore its profitability.

By contrast, we don't have to wonder a great deal about political communities. We know what to expect there. But no one should expect perfect consistency in either category. Even heaven had its Lucifer. What counts is the characteristic behavior we can expect of business enterprise, which is premised on service, as contrasted with piratical enterprise, which is by its nature predatory. Either one may step out of character on occasion, but such exceptions only point up the rule.

8. How will global decision-making take place?

I envision a deployment worldwide of small, autonomous communities not unlike what are called in anthropology "acephalous" or "stateless" societies, all cooperating rather informally at various levels by networking. For this view I am indebted to the late anthropologist Virginia H. Hine (1977, 1984).

9. But isn't profit the incentive driving all of this?

Yes, it's business incentive, and that is what makes it self-sustaining and enduring. Commerce is greatly undervalued and underestimated. The great and growing trend is for land to be administered as productive capital, and in the process what we are witnessing is a natural evolution of leasehold land tenures—exactly what Henry George, Ralph Borsodi, and others proposed as the cure for excessive speculation in land. But they didn't see that cure coming about as a spontaneous market process, powered by ordinary business incentive. It is strange that no one before Spencer Heath ever anticipated it happening this way.

10. Why will this change come about quickly instead of over a long period?

We know from history that when conditions are right for a new kind of development, that development can happen very rapidly. In this case we need only recall the crucial role of numbers in enabling us to develop science and commerce, and then observe that something spectacular is happening now. The advent of computers has increased our ability to manipulate not only numbers but information of all kinds by orders of magnitude, and this capability is progressing at an exponential rate. Moreover, the

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modem and personal computer, by making the home office a viable alternative to "downtown," is empowering individuals and enabling an exodus from the regimentation of the workforce, a decentralization within the marketplace of truly awe-inspiring magnitude.

For this reason among others I wouldn't be surprised to see the entrepreneurial community pattern become general by the second quarter of the next century. At that time, should this development have occurred, we will not have overthrown but, without fanfare, will simply have outgrown government as we know it today. Government personnel will have moved into new, more productive employment. Human society, which I believe on the tribal level manifested the normal, healthy societal pattern albeit at an immature stage, will have matured and come into its own. Humankind finally will have negotiated what it may long look back upon as a difficult and hazardous riser in the stair of societal evolution.

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REVIEW ESSAY

Why Did the East Germans Rebel?

SUSANNE LOHMANN

In June 1953, 500,000 citizens of the German Democratic Republic (GDR) participated in a mass revolt against the regime. Their protest was violently suppressed. Between 1953 and 1989, mass demonstrations were unheard of in the GDR. Then, in the fall of 1989, the citizens of Leipzig took to the streets. They demonstrated on thirteen consecutive Mondays, between September 25 and December 18. Turnout peaked at more than 300,000 on November 6. The Berlin Wall fell a few days later. On October 3, 1990, just one year after the first "Monday demonstration," the GDR ceased to exist when the five East German states acceded to the (West German) Federal Republic of Germany.

The East German protest raises one of the most difficult questions of social science: what drives people to participate in collective action? Karl-Dieter Opp, the premier German sociologist, considers this question together with Peter Voss, an East German pollster and public opinion specialist, and Christiane Gern, a West German researcher, in *Origins of a Spontaneous Revolution: East Germany, 1989* (1995). Most accounts of the 1989 revolution in the GDR consist of thick description that can at best be classified as insightful journalism. The book by Opp, Voss, and Gern stands out because the authors take the "science" in social science seriously. Their

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account is based on a theory of rational action and a systematic analysis of survey data. Their exemplary work on the East German revolution belongs on the bookshelf of every serious scholar of collective action and of modern Germany. Having made a strong positive statement, I now turn to some problems I have with the theory, the data, and the literature review provided by the book.

Perception Biases and Collective Action

The theory of rational action in this book is largely based on Opp's earlier work (e.g., Opp 1989). The basic unit of analysis is the individual, who takes action if the benefits of participating in collective action exceed the costs. To explain how people overcome the free-rider problem of collective action, Opp, Voss, and Gern invoke the existence of a perception bias:

> the single individual within a large group has no influence on the provision of the public good at which the group aims. This may be true, but a single person's decision to take part in a demonstration does not depend on whether this person will really be influential, but rather on whether she or he perceives that her or his participation makes a difference. Empirical research has shown that there are many people who believe that their individual political action, whether voting or protesting, is influential. (Opp, Voss, and Gern 1995, 36)

The authors marshal survey data to demonstrate the empirical descriptiveness of the assumption that people believe their actions can affect the outcome of a collective enterprise. In November and December 1990, a representative sample of 1,300 citizens of Leipzig were surveyed about the events that occurred in the fall of 1989. The authors also interviewed 209 members of opposition groups and another 19 citizens of Leipzig. A large percentage of the survey respondents did indeed express the belief that their actions were politically influential.

Unfortunately, these data do not allow the authors to discriminate effectively between their perception-bias hypothesis and the null hypothesis that people's assessments are accurate.

Prisoner's Dilemma versus Voluntary and Costly Contributions to a Public Good

Mancur Olson (1965) argues that costly participation in a collective enterprise is subject to a free-rider problem. Misinterpreting Olson's contribution, many social scientists conceive of collective action as a prisoner's dilemma problem, which yields a point prediction of zero participation (at

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least in a one-shot or finite-horizon setting). To "explain" why people nonetheless engage in collective action, scholars invoke altruism, social norms, social embeddedness, selective incentives, political leadership, psychological benefits of participation or costs of nonparticipation, and the like. Opp's theory invokes a perception bias.

Counter to conventional wisdom, many examples of collective action are more adequately modeled not as a prisoner's dilemma but as a game of voluntary and costly contributions to a public good. John Ledyard (1984) and Thomas Palfrey and Howard Rosenthal (1985) pioneered the game theory of voting; I developed the game theory of mass demonstrations (Lohmann 1993, 1994). Game-theoretic participation models provide rigorous underpinnings for Olson's insights, yielding positive turnout as an equilibrium prediction even when individuals are instrumentally self-interested and do not suffer from perception biases of any kind. In principle, the notion that people are instrumentally rational and self-interested is consistent with the observation that people engage in collective action. The real issue is not whether game theory can explain the fact of collective action. Instead, the paradigm is challenged by the turnout of huge numbers of people—thousands, and sometimes tens and hundreds of thousands, or even millions.

A Numerical Example

A simple model, which draws on Palfrey and Rosenthal (1988, 1991a, 1991b, 1994) and Lohmann (1995), serves to illustrate why Opp's theory is wrong. There are N individuals, indexed $i = 1, \ldots, N$. The status quo regime is overturned in favor of an alternative regime if at least K out of N individuals participate in a revolt. The utility payoff under the status quo is normalized to zero, the utility payoff under the alternative regime to one. Individual i is privately informed about her cost of demonstrating, C_i, which is drawn from the uniform distribution defined over the interval [0,1]. (The model can be extended to allow for heterogeneity and private information about benefits.)

An equilibrium in this game consists of a "cutpoint" decision rule: if individual i's cost lies below a threshold $\hat{C}$, she participates in the revolt; otherwise she abstains. Expecting all other individuals to follow this rule, each individual calculates the probability that her action is decisive as being equal to the probability that $K-1$ out of $N-1$ individuals draw costs below the threshold $\hat{C}$. This probability corresponds to the binomial probability that $N-1$ Bernoulli trials result in $K-1$ successes when the

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probability of a success is equal to $\hat{C}$,

$$b(K-1; N-1, \hat{C}) \equiv \frac{(N-1)!}{(K-1)!(N-K)!} \hat{C}^{K-1} (1-\hat{C})^{N-K}.$$

To close the model, I need to provide an expression for the critical threshold. Individual i strictly prefers to participate in the revolt if the probability that she is decisive for a change in regime, $b(K-1; N-1, \hat{C})$, multiplied by the benefits of a change in regime, one, are strictly greater than her cost C_i. Conversely, she strictly prefers to abstain if $b(K-1; N-1, \hat{C})$ is smaller than her cost C_i. Consider a hypothetical individual whose cost is such that the individual is exactly indifferent between acting and abstaining. Her indifference condition,

$$b(K-1; N-1, \hat{C}) = \hat{C} \quad , \qquad (1)$$

defines the threshold $\hat{C}$. (I cannot provide an explicit solution for the threshold $\hat{C}$ as a function of the parameters N and K, but later I will calculate some numerical examples.)

Next, I modify equation (1) by introducing a perception bias ε, resulting in equation (2):

$$b(K-1; N-1, \hat{C})\, \varepsilon = \hat{C} \quad . \qquad (2)$$

For $\varepsilon = 1$, equations (1) and (2) coincide; this is the special case where individuals assess their probability of being decisive accurately. Individuals underestimate this probability if $\varepsilon < 1$. Opp's claim that individuals overestimate this probability corresponds to $\varepsilon > 1$.

Using the program Mathematica, I calculate the cutpoints $\hat{C}$ that solve equation (2) for $N = 10$, $K = 3$, and $\varepsilon \in \{0.9, 0.99, 0.999, 1, 1.001, 1.01, 1.1\}$. Table 1 documents the results. A given perception bias ε gives rise to three equilibria: one equilibrium with a zero cutpoint ($\hat{C}_1$), one with a strictly positive but low cutpoint ($\hat{C}_2$), and one with a strictly positive and high cutpoint ($\hat{C}_3$). In interpreting table 1, it is useful to keep in mind that $\hat{C}$ is not only the cutpoint of the individuals' decision rule; $\hat{C}$ is also equal to the ex ante probability that a given individual participates in the revolt, as well as the probability that this individual's action is decisive.

This numerical example demonstrates that Opp's theory is wrong on

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Table 1

Perception Bias	Collective Action Cutpoint		
ε	$\hat{C}_1$	$\hat{C}_2$	$\hat{C}_3$
0.900	0	0.04154	0.26412
0.990	0	0.03636	0.28016
0.999	0	0.03592	0.28162
1.000	0	0.03587	0.28179
1.001	0	0.03582	0.28195
1.010	0	0.03539	0.28339
1.100	0	0.03162	0.29670

two counts. First, Opp suggests that for $\varepsilon = 1$ we get a zero turnout equilibrium, while for $\varepsilon > 1$ we get an equilibrium with strictly positive turnout. But table 1 shows that there is nothing special about the case of $\varepsilon > 1$. The probability that a given individual participates in the revolt is zero in one equilibrium and strictly positive in two equilibria, for $\varepsilon > 1$, $\varepsilon = 1$, and $\varepsilon < 1$. Second, Opp suggests that the individuals' incentives to participate increase as we move from no perception bias ($\varepsilon = 1$) to a positive perception bias ($\varepsilon > 1$). His claim is consistent with the comparative statics for the high cutpoint equilibrium (the cutpoint $\hat{C}_3$ increases as ε increases), but it is inconsistent with the comparative statics for the low cutpoint equilibrium (the cutpoint $\hat{C}_2$ decreases as ε increases) and the zero cutpoint equilibrium (the cutpoint $\hat{C}_1$ remains constant as ε increases).

Inconclusive Evidence

Standard game-theoretic models like the one developed here predict that an individual action is decisive with strictly positive probability. Thus, survey results indicating that people believe their actions make a difference are qualitatively consistent with game theory. Specifically, such survey results do not allow us to decide, one way or the other, whether people's assessments of their political influence are accurate. It is possible, of course, that the *quantitative* predictions of game theory err greatly; that is, people may well overestimate the probability that their actions are decisive. But the theory and evidence presented by Opp, Voss, and Gern do not allow us to discrimi-

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nate between the perception-bias hypothesis and the null hypothesis. The heterogeneity in people's assessments that shows up in the authors' data is in fact inconsistent with the standard game-theoretic model, in which people's beliefs are homogeneous, but it is consistent with richer models that allow for informational heterogeneity (e.g., Lohmann 1993, 1994). The authors did not formulate their survey questions in a way that would allow us to discriminate between the two hypotheses: in their view, any evidence indicating that individuals believe they are politically influential necessarily supports the perception-bias hypothesis. In contrast, Palfrey and Rosenthal's (1991a, 1991b, 1994) laboratory experiments are designed to discriminate between the possibilities that people's voluntary and costly contributions to a public good are driven by perception biases and various other factors (altruism, learning, cheap talk, repeated play).

Survey Responses versus Costly Collective Action

Palfrey and Rosenthal's empirical specification is more powerful than that of Opp, Voss, and Gern for another reason. Palfrey and Rosenthal's inferences are drawn from people's costly actions in the laboratory, whereas Opp, Voss, and Gern's conclusions are based on people's responses to survey questions, which do not provide rewards or penalties that would create incentives to respond truthfully or accurately. We know that people's responses to survey questions are unstable over time and vary quite sensitively with question wording and order. Who knows what is going on in people's heads when they are asked how they perceived their personal chances to change the political and economic situation in the GDR by taking various actions, or when they are asked about the extent to which they agree with the statement "I thought: If I take part in demonstrations and similar actions now, I personally can make a difference"? At the time of the survey, the respondents already knew that the mass protests they had been involved in were hugely successful in bringing about political change on a revolutionary scale. Do we honestly believe that if the revolution had been unsuccessful and we had asked them those same questions, they would have answered in the same way? The potential for hindsight bias is mind-boggling.

Evolutionary Underpinnings of Perception Biases

Opp's theory, which simply assumes the existence of a perception bias to explain collective action, is too facile. Although people may be less than fully rational, it is likely that they systematically overestimate their political influence in certain situations and underestimate their influence in others. To take seriously the idea that collective action is driven by perception biases, we must go beyond simply assuming that such biases exist.

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One possible path we might take is to make use of the emerging literature on evolutionary game theory and evolutionary psychology (Waldman 1994; Cosmides and Tooby 1992), which suggests that perception biases may arise as a result of evolutionary selection effects. We could examine an evolutionary environment in which many successive generations of people play a game involving voluntary and costly contributions to a public good. In this setting, there is a high payoff to a group of individuals that overcomes the free-rider problem of collective action, but within that group the individuals who contribute to the public good get a relatively lower payoff. The probability that a given type "survives" into the next generation is positively related to his or her payoff. We can think of an individual's perception bias as being his or her "type." That is, different types have different beliefs about the probability that their contributions are decisive: they over- and underestimate this probability to different degrees. Without further analysis, it is not obvious that the type who overestimates the probability that his or her contribution is decisive will emerge as the dominant type in this evolutionary game; nor is it obvious whether, on average across types, people will have a tendency to overestimate the probability of being decisive.

Newer Literature

Opp, Voss, and Gern's book was originally published in Germany (Opp, Voss, and Gern, 1993), two years before the University of Michigan Press published the English language translation. The 1995 edition was not updated, except for a handful of references. It builds primarily on the pre-1991 literature on collective action and East Germany, containing a handful of references dated 1992 and 1993 and one reference dated 1994. As a consequence, the book does not make use of the immense amount of scholarship about the East German revolution that has accumulated over the last few years. Our understanding of the German Democratic Republic, the East German revolution, and postunification East Germany has developed enormously since 1991, and for this reason it is crucial for readers to date the secondary materials they consult. A scholar seeking to become acquainted with the state-of-the-art research on East Germany cannot rely on Opp, Voss, and Gern, though their book is an excellent starting point for scholarship in this area.

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BOOK REVIEWS

✦ Hayek's Political Economy: The Socio-economics of Order

By Steve Fleetwood

London: Routledge, 1995. Pp. xi, 178. $74.95 cloth.

Those who thought that Friedrich A. von Hayek's work has been so well researched that little new can be said about it will get a pleasant surprise, as well as considerable intellectual enlightenment, from reading *Hayek's Political Economy*. By concentrating on a narrow aspect, Steve Fleetwood manages to say some quite original things about economics and social philosophy and, most important, something new in our understanding of the genealogy of Hayek's ideas. The book, it should be noted, deals only with the purely philosophical aspects of Hayek's economics; the reader will find little here about Hayek the defender of liberty, the opponent of "social justice," the spokesman for the common law, or even the later exponent of evolutionism.

Although it might be true to say that Hayek's abiding concern in social science was to demonstrate that in the social world there is order without design—that a kind of predictability and regularity is possible in human affairs without the need of a Leviathan state or the invocation of mystical forces beyond the realm of science—what is remarkable is the variety of explanations he used for such a phenomenon. Fleetwood charts a kind of Hayekian intellectual odyssey by which this conclusion was reached: first, by more or less orthodox positivism, then by a kind of subjective idealism (or hermeneutic foundationalism), and finally by the use of a quasi-transformational realism (the reader will have to get used to the author's use of complex, but by no means dispensable, jargon). Thus there is a Hayek I, which covers Hayek's period as a technical economist from the late 1920s until about 1937 and the publication of Hayek's important paper "Economics and Knowledge" (which Fleetwood strangely dates as 1936); from then on (Hayek II), he became concerned with demonstrating the methodological differences between natural and social science and the

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apparently irredeemably subjective nature of the latter until about 1960; and onward (Hayek III), when he began to develop a new social theory based on the idea of man as a rule-following animal, a theory that provides the final building block in his explanation of order.

Although in his early years as a monetary and trade-cycle theorist Hayek (and other "Austrians") departed from orthodoxy in technical economics, he was still a positivist in the sense of believing in "laws" (constant conjunctions) of a Humean type that the economist could discover. Most notable of these regularities was the existence of (or tendency toward) equilibrium, which was normally disrupted only by misguided monetary intervention by government. His subsequent dissatisfaction with this idea is now well known. From 1937 onward his concern with the subjective nature of economic knowledge led him to reject more formally the search for a Walrasian-type perfect harmony of economic actions.

From then on Hayek stressed the differences between natural and social science. Subjectivism means that social reality consists of the thoughts and conceptualizations people have about the world; there is no objective reality out there waiting to be discovered by the observer, nor any possibility of precise predictions that could be subjected to empirical tests. There is only a complexity of events that the observer can understand *(verstehen)*. This situation does not preclude the possibility of some quasi-scientific "laws," because people of similar minds will have similar conceptualizations of phenomena (how else could inflation, the Ricardian law of rent, and other economic propositions be explained?), but these "laws" have virtually zero empirical content. Thus, the whole subjectivist approach leads to dead ends. For if social reality does not (ontologically) exist apart from minds, there is no way to satisfactorily explain order. There is certainly no method by which even a tendency toward equilibrium (which Hayek never fully believed in anyway) could be demonstrated, as there is no explanation of how the dispersed knowledge (which had been the concern of Hayek since at least 1937) in an economy can be coordinated.

Only when Hayek hit upon the theory of dispersed and tacit knowledge and showed how it can be coordinated could he develop a full-fledged scientific theory of order. Fleetwood describes extremely well the argument that it is not just the "telecom" system, or price mechanism, that produces coordination but the whole network of rules and practices that enterprising agents exploit in their economizing. We need to understand the "discovery, communication and storage of knowledge." This understanding requires an analysis of the "deep structures" of society, those partially hidden practices that are neither revealed by the brute empiricism of positive economics nor made available to the subjectivist idealist (whose knowledge of social reality is limited to the conceptualizations abstract individuals make of it).

Crucial here is "tacit" knowledge—knowing how to do things rather than merely being aware of objective facts. Entrepreneurs have not merely special or local knowledge of some price differential (that could perhaps be

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stored in a computer, as the early market socialists claimed) but also a capacity to act in an enterprising way and to accommodate their behavior to local customs, morals, and practices. They know how to go about the activity of entrepreneurship. That "know-how" is incommunicable in a direct way, but it is essential if coordination—tentatively defined as the nonradical divergence of expectations—is to be achieved. Thus for Hayek, *Homo economicus* is to be rejected not (thankfully) because he fails to live up to our highest moral expectations but because the immense computational facilities required for coordination *and,* more important, the tacit knowledge of how to do things are not encompassed by that concept. It might have some use as a theoretical fiction, but it is inadequate to explain economic order. It cannot possibly explain how agents "re-create, reproduce and transform social structures."

Fleetwood brings out the novel features of Hayek's work in an instructive comparison with the work of Israel Kirzner. Some of us used to make the ironic comment that Kirzner, with his attempted demonstration of the inexorable tendency of markets to equilibrate (albeit temporarily and imperfectly) through successive acts of entrepreneurship by alert individuals, was really Frank Hahn (the Cambridge, U.K., theorist of dynamic equilibrium) without the math. Fleetwood confirms this perhaps unfair description by arguing that Kirzner is really writing about the telecom system, which is powered by repeated acts of arbitrage, and not about the Hayekian world of truly decentralized agents somehow getting along by following rules and practices they can barely state.

Still, in defense of Kirzner it should be stressed that coordination does require his kind of responsiveness to gaps in the market, and an awareness of unexploited opportunities for profit, just as much as it needs the preservation and transformation of customary rules and practices. Indeed, sometimes the latter might impede entrepreneurship; the innovator might well have to overturn prevailing practices, not merely transform them. Hayek himself seems aware of this possibility in his *The Fatal Conceit,* where he shows how the transition from the tribal society to the extended order comes about through the breaking up of conventional and comforting (but "inefficient") practices. The more general point is that there can be tacit ignorance in society (and not just in primitive orders) that is communicated and stored within its deep structures. Evolution may eliminate such inefficiency (this, in fact, was Hayek's final position), but Fleetwood does not examine this issue.

My major criticism of Fleetwood's excellent book is that although he successfully records the routes by which Hayek reached his final demonstration of socioeconomic order, he does not inquire into whether Hayek has given us a satisfactory answer. Some writers adopt similar philosophical premises about the dispersed and tacit nature of knowledge but have less confidence in the likelihood of satisfactory coordination. I have in mind the radical subjectivists, Ludwig Lachmann and G. L. S. Shackle, who doubt the existence of even the harmonizing potentiality that Hayek sees in free

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economies, let alone the possibility of equilibrium. Fleetwood refers to Lachmann's emphasis on "divergent expectations" (that could lead to a spontaneous breakdown of the *catallaxy*) but does not take up the full implications of this hypothesis. Of course, even if spontaneous discoordination can occur, it does not follow that state action could ameliorate it, and indeed much of Austrian economics deals with the disruptive effects of government intervention. Hayek merely says that the market coordinates "better than any known alternative," rather than asserting a tendency to equilibrium; the latter claim is the clear implication of the work of people such as Kirzner. But put this way the arguments for the market look more modest than most people have come to expect.

Although I would like to have seen a thorough inquiry into this problem, my admiration for the book remains undiminished. Uninitiated readers may find the philosophy a little difficult, and some familiar topics are, regretably, unexplored. It might not be the case historically that Hayek's work falls into Fleetwood's neat periods (and the author does admit to some obvious overlapping), but the logical structure of the argument is impeccable. *Hayek's Political Economy* is a profound and sophisticated contribution to Hayekian scholarship.

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✦ Pay Any Price: Lyndon Johnson and The Wars for Vietnam

By Lloyd C. Gardner

Chicago: Ivan R. Dee, 1995. Pp. 610. $35.00 cloth, $18.95 paper.

In the opening pages of his lengthy history of the Johnson administration's Vietnam policy, Lloyd Gardner observes that explaining America's involvement in Vietnam is not a simple matter. To his credit, Gardner endeavors to provide a multidimensional analysis of an extraordinarily complex topic. He faces a difficult task, for at the most basic level he must provide a convincing thesis to explain why an American president persisted in a policy that showed unmistakable signs of failure early on. Indeed, that president refused to retreat even when it became apparent that the Vietnam intervention was undermining his Great Society domestic agenda, supposedly his highest priority, and imperiling his political future.

Gardner's effort to provide a comprehensive and compelling explanation is only partially successful. The most serious weakness is his emphasis on the economic dimensions of American policy. Readers of Gardner's previous works will hardly be surprised at the prominence of that factor in *Pay Any Price*. And there is no denying that economic considerations played a role in the Johnson administration's Vietnam policy. Gardner argues that LBJ's

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formative experiences during the New Deal era led to an unusual attachment to the gospel of government-directed economic development. Johnson believed that generous offers of developmental aid to North Vietnam would persuade Ho Chi Minh to abandon his aggressive strategy to subjugate South Vietnam and instead join in cooperative enterprises that would benefit all of Vietnam. As Gardner puts it, Johnson was confident that it was possible to convince Ho "to accept a dam on the Mekong River instead of a residence in Saigon" (p. 23).

That approach was certainly evident in Johnson's April 1965 speech at Johns Hopkins University. In that address, which many scholars of the Vietnam War era have dismissed as a crude piece of propaganda, the president proposed a massive TVA-style development project for North Vietnam if Hanoi renounced its efforts to reunify the country by force. There is every reason to believe that the offer was not a cynical ploy but a genuine carrot in a carrot-and-stick strategy. Moreover, Johnson was not the only member of the administration to hope that such rewards might induce Hanoi to adopt a more cooperative policy. Some of the president's most influential advisers, most notably Walt W. Rostow, also embraced that approach.

Unfortunately, Gardner takes that application of the economic thesis too far. Although economic considerations influenced Washington's Vietnam policy during the 1960s, they never constituted the dominant factor. Gardner's thesis is admittedly more sophisticated than the crude Marxist analyses of some of his left-wing colleagues, such as Gabriel Kolko, who seem to believe that the United States fought a decade-long war and suffered more than 58,000 fatalities in an attempt to secure the oil and mineral resources of Southeast Asia. Nevertheless, Gardner attributes too much importance to Johnson's fascination with development aid as a means of promoting peace and prosperity.

He is on somewhat sounder footing when he notes that the president and his advisers viewed the Vietnam conflict as a challenge to the U.S.-led global political and economic system. Failure by the United States in Vietnam, they feared, could lead to an unraveling of that system. The primary threat was not that the forces of international communism would sweep to victory. The danger was more subtle and complex. An American retreat from Vietnam would undermine the confidence of Washington's principal political allies and trading partners in the credibility of U.S. commitments elsewhere in the world. That decline of confidence, in turn, could impel erstwhile allies to adopt positions of neutrality toward the U.S.-Soviet struggle, to renationalize their security policies, or both. In other words, Washington's strategy of maintaining its leadership of the "free world" by suppressing potential rivalries among its many allies and clients, smothering great-power ambitions on the part of such major allies as Germany and Japan, and preserving a (relatively) open international trading and investment climate would be fatally undermined.

According to such reasoning, the Vietnam conflict had economic and

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political importance far beyond the intrinsic issues at stake in Southeast Asia. That aspect of Gardner's thesis is not unique. Other historians and international-relations scholars, most recently the World Policy Institute's Benjamin Schwarz in the pages of the *Atlantic Monthly,* have made similar cases. Gardner, however, does an especially effective job.

Unfortunately, he again does not adequately appreciate that the political and security dimensions of the "global-order" motivation for the U.S. intervention in Vietnam were at least as important as the economic dimension. At various places in the book he considers those aspects only to pull away before fully assessing the implications. For example, he argues that LBJ's real credibility gap was not his attempt to deceive the American people about U.S. fortunes in the war. Instead, the gap separated the arguments that he and his advisers used to justify Washington's policy, which relied heavily on the Munich analogy, from "a reality that did not correspond" to that analogy (p. 536).

Gardner's implication that Johnson's sin was one of self-deception more than deception of others is fascinating, although highly debatable. Indeed, the evidence suggests that a good deal of both may have been taking place. The more significant point, though, is that the Munich analogy has always had far more to do with strategic than economic motives. And that applied to the Johnson administration as well as its predecessors—and its successors. Administration officials may have feared the loss of American economic primacy, but they feared even more a repetition of the events of the late 1930s that culminated in a global military catastrophe. The comments of Dean Rusk, McGeorge Bundy, and Walt Rostow, both during the Vietnam War and in subsequent writings, reveal an obsession with the Munich analogy—for *security* more than economic reasons.

It is unfortunate that Gardner did not devote more attention to the significance of that obsession, for it has more than merely historical interest. The Clinton administration justified the decision to send troops to Bosnia by referring repeatedly to the Munich analogy. Following her appointment as secretary of state, Madeleine Albright stated bluntly that although Vietnam was the defining event for most members of her generation, Munich remained the defining event for her. Given the disastrous consequences that the obsession with "avoiding another Munich" in Vietnam caused for America, the continued dominance of the analogy is reason for grave concern.

Equally disquieting is that the Johnson administration persisted in the Vietnam intervention in the face of mounting evidence that the policy was failing. Several times between the beginning of the Johnson presidency in November 1963 and North Vietnam's Tet Offensive in February 1968, U.S. policymakers confronted developments that required them to choose retreat or escalation. On each occasion save the last, they chose escalation.

Robert McNamara states in his latest book that he concluded as early as 1964 that victory in Vietnam was not possible—a position most historians previously believed was unique to George Ball among presidential advisers.

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Although those realizations came surprisingly early (and in McNamara's case perhaps retroactively repositioned in time with the benefit of selective memory), the entire administration certainly had to have had doubts about the prospects for success by 1966 or 1967. Nevertheless, they slogged on. (Nixon administration officials deserve even harsher criticism. Despite the spectacular failure of their predecessors, they dragged out the U.S. withdrawal for another four agonizing, bloody years.)

Although the global-order rationale was a crucial motive for such futile persistence, there were signs of an additional motive. The intangible but important factors of personal and national pride lurked behind the repeated invocations to stay the course to preserve America's "credibility." It is difficult for any person to admit that he blundered on an important matter. It is especially difficult for the leaders of a nation that has rarely experienced failure to make that admission. For LBJ and his advisers to concede that the Vietnam intervention was a mistake would have required them to acknowledge that they had quite needlessly sacrificed the lives of thousands of American soldiers—and been responsible for the equally needless deaths of more than a million Vietnamese. It is not surprising that policymakers might recoil from accepting such a burden of responsibility.

Unfortunately, that tendency did not end with the Vietnam intervention. Richard Holbrooke, the architect of the Dayton accords, now insists that the United States and its NATO allies cannot tolerate failure in Bosnia—even if preventing failure requires both the prolongation and the escalation of the current commitments. Some proponents of NATO's expansion into Central and Eastern Europe now privately concede the proposal was a poor idea and that they underestimated the depth of Russia's opposition as well as numerous other problems. Nevertheless, they insist that the alliance has gone too far to turn back now. Reneging on the promise of enlargement, they argue, would deal an irreparable blow to America's credibility.

That reasoning echoes the "logic" that caused Lyndon Johnson to stubbornly stay the course in Vietnam even at the cost of creating bitter domestic divisions and ultimately undermining his presidency. If the Vietnam tragedy has an enduring lesson, it is that cutting losses promptly is better than persisting in policies once evidence emerges that the initial assumptions were faulty. Policymakers who seek out new military adventures for America in the Balkans and elsewhere need to absorb this lesson. The lives of American military personnel are too important to sacrifice for reasons of national (much less personal) prestige or pride.

Pay Any Price offers some significant insights into the motives and reasoning of President Johnson and his advisers. Yet ultimately it is an unsatisfying analysis of America's disastrous Vietnam policy. Gardner touches on numerous important issues, but he provides only a modest number of convincing explanations.

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✦ Sovereign Nations or Reservations? An Economic History of American Indians

By Terry L. Anderson

San Francisco: Pacific Research Institute for Public Policy, 1995. Pp. xvii, 202, $19.95 cloth.

This book deals with two key aspects of the public image of American Indians in the United States today: their advocacy of respect for nature and their poverty. Regarding nature, Anderson seeks to defend the thesis that "rather than promulgating myths that societies can solve their economic and social problems only by consciously choosing to revere and respect plant and animal communities, we should learn from American Indians that it is the institutional environment that matters most" (xv). Similarly, poverty can also be explained by an analysis of institutions. The book applies the ideas of the property-rights school of political economy to seek understanding of aboriginal Indian economies, the dynamics of interaction between natives and settlers on the American frontier, and today's reservation conditions. Anderson clearly explains that institutional barriers were not freely chosen by tribes.

By putting the sole emphasis on institutions, the author precludes careful examination of the balance of causes of Indian poverty today. One should expect both the expropriation of Indian property in the past and the exercise of federal control over remaining reservation resources throughout most of the twentieth century to have had effects. Some tribes—such as the Taos Pueblo—are very clear in stating that they do not necessarily want economic growth if the impact on their environment is too great; this cultural factor should also be included. Surely, resource endowment, community goals, and governing institutions all have influence.

The first chapter, "Culture, Property Rights, and Paradigms," provides the reader with a review of the property-rights paradigm, with brief references to competing paradigms. The second chapter, "The Red Man's Law," starts the substantive analysis. Anderson identifies the existence of usufruct tenure systems and the defense of territories by bands of Indians as evidence that private ownership existed among Indians prior to contact. This argument uses an unusually broad definition of private ownership. Many Indian communities allocated individuals use rights to land and particular resources without at the same time allowing users to sell the land or the resource use rights. The Iroquois and Hopi, for instance, recognize use rights but prohibit sales by individuals. The hunting territories of the Cree are individually allocated and can be inherited, being passed down from father to son; but sales were not and are not permitted. In the presence of use rights rather than full private ownership, how can political economy show that precontact Indian societies "got the incentives right"? Anderson concludes that they did get the incentives right. But Indian leaders were adamant on the prohi-

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bition of land sales as part of the incentive system that provided respect for the land. This particular puzzle remains unrecognized and unsolved in this book.

The third chapter, "Adaptation for Survival," examines the changes the horse created among Plains Indians, using the framework of the evolution of cultures. As a result of using the horse, Anderson predicts, hunting conditions would cause a decline in average group size, and warfare would cause an increase. He does not make clear, however, which effect predominated. The chapter is strongly functionalist in its examination of social evolution. In addition, the possibility that the effect of using the horse depended on whether a group had previously been hunter-gatherers or farmers is not explored.

The next three chapters examine particular aspects of frontier expansion. The fourth chapter, "The Political Economy of Indian-White Relations," asserts that the best explanation for the observed increase in Indian wars after the Civil War is that a standing army needed someone to fight. Chapter 5, "Bureaucracy versus Indians," explains how the alliance of settlers, politicians, and the emerging Indian Office led to a reduction in the Indian land base. The chapter provides a useful review of the work of Lee J. Alston and Pablo T. Spiller and of Leonard A. Carlson on the dynamics of land expropriation during the allotment period. The iron-triangle theory could also be applied to Indian irrigation projects, as explained by J. A. McDonnell in *The Dispossession of the American Indian,* 1887–1934 (Bloomington: Indiana University Press, 1991).

"The Legacy of Allotment," chapter 6, explores the impact of individual and trust tenure on selected economic outcomes. By 1934, the allotment policy had created "checkerboard" reservations throughout the country, with the exception of some reservations in Arizona and New Mexico. Much land on reservations became owned by non-Indians. Land that remained in Indian ownership also stayed under the supervision of the Bureau of Indian Affairs (BIA). The chapter examines the implications of BIA involvement for the use of agricultural and forested lands. Its discussion only scratches the surface of the complications that have occurred on reservations due to the federal government's role in the management of Indian lands. Issues related to minerals, oil, and gas extraction could also have been included in this chapter. The use of water on and near reservations also deserves coverage. The chapter contains an analysis comparing trust agricultural lands to lands held in fee simple on and near reservations; the test does not plausibly control for land quality, access to capital, or access to water. All capital-access problems are attributed to trust tenure, which is said to prohibit mortgages. The chapter concludes with a review of a study that demonstrated principal-agent theory with data on reservation forestry, showing that Indians earn more on sales that they supervise, as compared to their earnings under federal supervision. Although the example is interesting, larger forest management issues are ignored. For instance, as

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tribes gain control of their forests, they shift away from exclusive focus on timber production as well as improve their return from timber sales. This chapter, furthermore, is extremely selective in its references to the literature on contemporary land use on reservations.

A thorough comparison of the role of resource endowments as opposed to tribal institutions in explaining Indian poverty would have to give some quantitative assessment of the role of federal management of Indian lands. Although Anderson recognizes the problems with federal trusteeship, the subsequent chapter, "Constitutions and Culture," focuses primarily on internal tribal issues and the problems with imposed institutions. Anderson repeats the often-noted fact that constitutions adopted by tribes under the Indian Reorganization Act (IRA) were hastily written and flawed in significant ways. He focuses on the lack of compatibility between traditional governing systems and the structures of the constitutions, as well as on the potential for corruption embodied in majority rule without adequate checks and balances. He could also have pointed out that most IRA constitutions gave powers to the secretary of the interior that had no other sources in federal law and that changes to the constitutions required approval of the secretary of the interior as well. Analysis of the incentives in traditional American Indian political institutions would have been helpful. Examples of such alternatives are consensus decision-making, the use of many types of chiefs for different purposes, and the system of checks and balances used by the League of the Iroquois. Many IRA constitutions have fewer checks and balances than does the federal constitution.

Rather than make policy recommendations, the book closes with five lessons. The mistakes of the allotment, reorganization, and termination policy have convinced Anderson and other scholars that support for self-determination by Indians is much better than any recommendation directed at the federal government. But general suspicion of governments, even local ones, informs the lessons. Granted, Indian adoption of sovereignty concepts from European political theory has created problems. The native requirement that political leaders give their wealth away could have been used as another lesson. Because all wealthy individuals were subject to the gift-giving requirements, the implications of such an institution could have been examined as one way in which values supporting sustainable use were enforced and rent seeking avoided. Gift giving may provide a disincentive for capital accumulation; restrictions on capital accumulation would limit economic growth, and limits on economic growth are a requirement for sustainable resource use.

How could one use this book, or what other literature would give balance to the coverage of Indian Affairs? An interesting undergraduate course could be structured around the contrast between political economy as presented in *Sovereign Nations or Reservations?* and in *The Political Economy of North American Indians,* edited by John H. Moore (Norman: University of Oklahoma Press, 1993).

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The main value of the book is its emphasis on the role of institutions. The primary shortcomings of the book stem from the tendency of the property-rights school of political economy to study economies with primary reference to private property rights and to study governance with an assumption that rent seeking is the major problem of collective action. Consequently, ways in which usufruct tenure, consensus decision-making, and systems of required gift-giving may have enforced respect for nature are not adequately examined. In addition, the author focuses attention on institutional incentives at the expense of giving adequate attention to more mundane causes of Indian poverty such as uncompensated property transfers accomplished by outright taking or administrative regulation.

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✦ The Captive Press: Foreign Policy Crises and the First Amendment

By Ted Galen Carpenter

Washington: Cato Institute, 1995.
Pp. 315. $24.95 cloth, $14.95 paper.

As you read Ted Galen Carpenter's *The Captive Press,* you get the idea that "Congress shall make no law...abridging the freedom...of the press" (the First Amendment) is a lot like "Thou shalt not kill": good advice, frequently ignored, especially in wartime. Carpenter's message is that restrictions on what reporters can learn and publish are almost always introduced with the argument that they are necessary to protect national security or the lives of troops, and yet usually serve no purpose other than to mislead the public into supporting bad policy or to protect government officials who have done their jobs poorly.

The few really valid military secrets have never been an issue. Reporter Seymour Hersh once observed that anyone who published technical details about nuclear weapons construction or combat submarine positions wouldn't find many readers at fifty cents a copy anyway.

Carpenter provides plenty of illustrations of outright U.S. government censorship on matters related to public policy and of government denial of access to important news sites, not just on the battlefield but also in the corridors of Washington. But he is equally concerned with the constant, often successful effort of U.S. government propaganda operations to seduce reporters into slanting the news the government's way. He provides abundant evidence that self-censorship by reporters—whether inspired by a greedy desire to curry favor with news sources or editors, or just by misguided idealism—can be more dangerous than overt government censorship.

Advocates of open government and a watchdog press will find *The*

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Captive Press the perfect supportive literature to hand out to friends and congressmen. It is an ideal cross between a tract and a scholarly tome (which Carpenter should consider adding, as he appears to have done most of the necessary research already). In this volume, the writing is lively, the recitations of data never stray far from a good yarn, the documentation is solid, and Carpenter goes on just long enough about each topic to persuade average citizens without entangling them in unnecessary complications.

Best of all, Carpenter is principled and free of partisan agendas. He isn't carrying water for Republicans or Democrats, capital or labor, and this neutrality allows him interesting insights. For example, his indignation over the witch-hunts against the Left in the McCarthy era is coupled with the perception that in many ways these injustices had roots in the Roosevelt administration's wartime propaganda machine, which blocked honest reporting about America's Soviet ally. After years of coverage in which even *Life* magazine referred to the Soviet secret police as a mere counterpart to the FBI, a backlash was stirred when the curtain was suddenly lifted on Soviet tyranny. This tardy revelation encouraged not only the McCarthy injustices, Carpenter says, but the "uncompromising attitudes" (p. 38) that led to frequent waste of lives and money in the Cold War.

Carpenter follows his argument into criticism of strict-constructionist courts that have deferred to the White House in its repeated efforts to avoid the spirit of the Freedom of Information Act. He suggests the courts should have actively promoted citizens' rights in accord with the act's obvious intentions.

And he accuses President Ronald Reagan, the widely perceived hero of limited government, of an unprecedented White House aggrandizement of information control: a lifetime censorship oath imposed on more than 100,000 government employees, which "gave a sitting administration considerable power to gag any former official whose writings or speeches might embarrass—or even merely contradict—current policy makers" (p. 84).

Carpenter maintains historical perspective. He notes that early in the Republic, the Alien and Sedition Acts "were directed at a group of anti-Federalist editors and pamphleteers" (p. 13) who had produced "criticism of John Adams's administration's conduct of foreign affairs" (p. 1). Carpenter otherwise acknowledges that government attempts at information control aren't new, and he uses some examples from the two world wars. But he concentrates on the Cold War and on various recent crises: U.S. troop missions to the Persian Gulf, Yugoslavia, Haiti, Somalia, and so forth. This focus keeps his narrative up-to-date and interesting, and also shows that elimination of the communist threat didn't end the press manipulation that supposedly had been justified by the presence of a communist threat.

Carpenter understands the pressures members of the press feel to report the government's daily dole of selected news in times of crisis, even when what the government says is suspect and leads to a gradual erosion of accurate perspective. He understands why the exceptional story that, after

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hurdling many obstacles, gets published, revealing the truth about something, is no match for the routine flow of easily published stories to the contrary, generated by government sources. Though these exceptional stories are often cited as examples of how well the press does its job, Carpenter shows that such reports can be diluted into near insignificance by the daily repetition of sanguine propaganda. He tells how U.S. military censors have delayed publication of accurate articles about military shortcomings until other articles can be generated and published to "shape public opinion before it could be challenged by contradictory information" (p. 33).

He cites an alarming litany of cases in which reporters shuttle between jobs in the press and in the State and Defense departments, with even network anchors such as Walter Cronkite accepting jobs narrating Defense Department promotional films. (I confess I twice accepted $500 speaking fees from the FBI training academy, with the approval of *Wall Street Journal* editors, while I covered crime for the paper. Even though the sums were small and I was clearly speaking my own ideas, not the government's, when a third invitation arrived a new set of editors said I shouldn't take the money, and on reflection I think the new editors were right.)

Where to apportion blame for misleading articles in the press remains a complex challenge. Though a democratic government shouldn't propagandize its constituents, America's most influential news outlets have hardly resisted the government's propaganda effort in line with their responsibilities. As Carpenter writes, "The bulk of the press has...shown a willingness to be cheerleaders for Washington's military adventures" (p. 247). He quotes the ready adoption of "we" by many well-known television reporters to refer to the American side in a conflict.

Whether this shortcoming has more to do with the weakness of reporters or with the fact that so much of the press is owned by large corporations—including major military contractors and others whose dominant financial interests range far outside the news business—is an issue Carpenter avoids, leaving, perhaps, an unfair onus on the reporters only. The growing activism of large American corporations overseas in recent decades is in part responsible for the growing government activism overseas, which, Carpenter shows, has made government's violation of the letter and spirit of the First Amendment increasingly dangerous.

Corporate interests aren't in Carpenter's line of fire. His point, though, is that the public is often deceived about the quality of news it gets concerning the government it elects and pays for. If he can succeed in persuading people of that—and he will, to the extent his book gets read—he will have performed a great service.

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Journal of Cultural Economics

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Cultural economics is the application of economic analysis to all of the creative and performing arts, the heritage and cultural industries, whether publicly or privately owned. It is concerned with the economic organization of the cultural sector and with the behavior of producers, consumers and governments in that sector. The subject includes a range of approaches, mainstream and radical, neoclassical, welfare economics, public policy and institutional economics.
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Etceteras . . .

Death and Taxes

AN ADAGE AFFIRMS THAT death and taxes are all we can expect with certainty. As maxims go, this one has a superior track record. But the truth it expresses extends far beyond its traditional signification.

Your Money or Your Life

Consider first that despite the insistence of public-choice theorists that political relations have the nature of an exchange in which the subjects pay "tax prices" to acquire services supplied by the government, the transaction in question bears little resemblance to market exchange. Unlike General Motors or Safeway, whose offers you may take or leave, the government threatens to kill you if you steadfastly resist entering into its deal. Hence, in "political exchange," death and taxes go together just as they do in the Mafia's proverbial "offer you can't refuse."

In the United States, members of Congress and the tax authorities enjoy describing our tax system as based on voluntary compliance, but everyone of normal intelligence appreciates that this is pure buncombe. As West Virginia Chief Justice Richard Neely noted in 1982, "Cheating on federal and state income tax is all pervasive in all classes of society; except among the compulsively honest, cheating usually occurs in direct proportion to opportunity" (quoted in Charles Adams, *For Good and Evil: The Impact of Taxes on the Course of Civilization*. New York: Madison Books, 1993, p. 379). Without the government's massive surveillance and harsh criminal sanctions, the number of tax-paying citizens would converge toward zero.

Of course, in this country the taxpayers can always protest. At the very beginning of our national life, when Congress enacted an excise tax on whiskey in 1792, the farmers of western Pennsylvania took offense. For these isolated producers, whiskey served as an important medium of exchange. Denouncing tyranny and waving banners proclaiming such un-American slogans as "Liberty, Equality, and Fraternity," they staged the Whiskey Rebellion in 1794. To put a point on their protest, the Whiskey Boys, as they called themselves, took to tarring and feathering tax collectors and the sheriffs who accompanied them.

Treasury Secretary Alexander Hamilton, who had proposed the whiskey tax in the first place, urged President George Washington to suppress the

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rebellion by armed force in order to teach the people a lesson in submissiveness. As Hamilton had explained to Washington in 1792, the whiskey excise was desirable so that "the authority of the National Government should be visible in some branch of internal Revenue; lest a total non-exercise of it should beget an impression that it was never to be exercised & next that it ought not to be exercised" (quoted in W. Elliot Brownlee, *Federal Taxation in America: A Short History*. Washington and New York: Woodrow Wilson Center Press and Cambridge University Press, 1996, p. 18). Washington raised an army of 15,000 militiamen—a larger army than he had ever commanded during the revolution—and personally led it into western Pennsylvania, where the rebels saw fit to capitulate and accept an amnesty. Ultimately their cause was vindicated, however, when under Jefferson the government abandoned nearly all its previous attempts to collect excise and direct taxes.

Your Money and Your Life

Historically, major wars and steep tax increases have coincided. As Bruce D. Porter has written, "War has been the lever by which monarchs and central governments have imposed increasingly larger tax burdens on increasingly broader segments of society, thus enabling ever-higher levels of spending to be sustained, even in peacetime" (*War and the Rise of the State: The Military Foundations of Modern Politics*. New York: Macmillan, 1994, p. 14). In the introduction to his three-volume collection of articles on war finance, Larry Neal observes that "many, if not most, of the lasting innovations in the way governments have collected taxes...have emerged under the duress of war" (*War Finance*, vol. 1. Aldershot, England: Edward Elgar, 1994, p. x). Neal presents nearly 1,800 pages of fascinating documents to support his claim.

Certainly in American history, major wars have brought both higher tax rates and new kinds of taxes. During the Civil War, when federal receipts increased tenfold and internal revenues rose from zero to more than $300 million (or more than half of total tax receipts), Congress placed excises on a wide range of goods and services, besides taxing incomes, inheritances, and real estate. According to Republican politico James G. Blaine, the revenue act of 1862 created "one of the most searching, thorough, comprehensive systems of taxation ever devised by any Government" (quoted in Jeffrey Rogers Hummel, *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War*. Chicago and La Salle, Ill.: Open Court, 1996, p. 222).

To collect its new internal taxes, Congress established the Office of the Commissioner of Internal Revenue, a precursor of today's fervently despised Internal Revenue Service. After the war, Congress eliminated most of the new levies but retained the "sin taxes" on tobacco and liquor. These yielded at least a third of all federal tax revenues in the period lasting from the 1870s to World War I. The government financed the Spanish-American War in large part by doubling the taxes on alcohol and tobacco products. Enforcing the liquor excise, the Treasury's "revenuers," as they became

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known in the hidden hollows of Appalachia, made themselves a plague upon the numerous operators of illegal stills—spiritual descendants of the Whiskey Boys of the 1790s.

The pecuniary cost of making war increased exponentially. At $3.4 billion, Civil War expenditures exceeded by 90 percent the total spending of the U.S. government in its entire preceding history ($1.8 billion). Roughly speaking, World War I cost ten times more than the Civil War, and World War II ten times more than World War I. Even though the Treasury financed most of its spending for each major war by borrowing, its tax bite outpaced its war spending: taxes amounted to about 9 percent of spending for the Civil War, 24 percent for World War I, and 41 percent for World War II (see Claudia D. Goldin, "War," in *Encyclopedia of American Economic History: Studies of the Principal Movements and Ideas*, vol. 3, edited by Glenn Porter. New York: Charles Scribner's Sons, 1980, p. 938).

The huge wartime tax burdens gave rise to widespread efforts to escape payment. In turn the government expanded its tax bureaucracy. Personnel of the Bureau of Internal Revenue increased from about 4,000 in 1913 to 15,800 in 1920. During World War II the Treasury brought on board another 40,000 employees. But enforcement alone had its recognized limits. Accordingly, during World War I and even more extensively during World War II the government resorted to insidious propaganda efforts aimed at persuading taxpayers to comply (see Carolyn C. Jones, "Class Tax to Mass Tax: The Rise of Propaganda in the Expansion of the Income Tax during World War II," *Buffalo Law Review* 37 [1989]: 685–737). Moreover, in 1943 Congress enacted a law requiring that taxes due on wages and salaries be withheld at the source, thereby ensuring workers would have little opportunity to keep their earnings out of the clutches of the tax collector (see Charlotte Twight, "The Evolution of Federal Income Tax Withholding: The Machinery of Institutional Change," *Cato Journal* 14 [Winter 1995]: 359–95).

World War II has often been described as a popular war, but the high wartime taxes were extremely unpopular. In 1944, for the first time ever, Congress overrode a presidential veto of a revenue bill, rebuking President Franklin D. Roosevelt's attempt to raise taxes even higher. Late in the war, tax protesters mounted a major effort to repeal the Sixteenth Amendment, and seventeen states passed resolutions in support of the proposal. In the words of political scientist John F. Witte (*The Politics and Development of the Federal Income Tax*. Madison: University of Wisconsin Press, 1985, p. 123), these events revealed "the depth of opposition—even during a period of national crisis—to high taxes."

A time-honored means of dealing with opposition to taxation, of course, is to levy the hidden tax by inflating the money stock. U.S. governments did so during each major war. As a result, roughly speaking, the value of the money dropped by about half during the Civil War (excluding the Confederacy, where the paper currency became totally worthless), World War I, and World War II. In the last case, the government concealed the

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decline of the dollar's value during the war by imposing comprehensive price controls, then allowed the dollar's shrunken value to reveal itself in 1946 and 1947 after the real damage had been done.

Rulers have appreciated how inflation serves as a tax since the days when monarchs clipped the coins. Once governments had begun to issue paper currency, the hidden tax became even easier to levy. During the War of Independence, which the Continental Congress and the breakaway states financed overwhelmingly by issuing paper money, Benjamin Franklin wrote that Congress

> hoped, notwithstanding its quantity, to have kept up the value of their paper. In this they were mistaken. It depreciated gradually. But this depreciation, though in some circumstances inconvenient, has had the general good and great effect of operating as a tax, and perhaps the most equal of all taxes, since it depreciated in the hands of the holders of money, and thereby taxed them in proportion to the sums they held and the time they held it, which generally is in proportion to men's wealth. (Franklin to Thomas Ruston, 9 October 1780, quoted in Margaret G. Myers, *A Financial History of the United States.* New York: Columbia University Press, 1970, p. 51)

By supposing that inflation served as a neutral wealth tax, Franklin erred. Obviously, some people held much more of their wealth than others did in the form of money and other assets denominated in nominal units of money. Moreover, some people surely anticipated better than others did the fall in the value of the paper money occasioned by its profuse issue. Of course, the Continental Congress had no power to levy explicit taxes and the states resisted its requisitions, so without inflationary finance it had little capacity to acquire the resources needed to conduct its military operations.

Further Reading and a Warning

Anyone who seeks to learn about the relation between death and taxes will find articles and monographs in abundance. Wide-ranging yet analytically competent studies are another matter. For the United States, the books by Brownlee and by Witte cited earlier contain much valuable material. Adams's book, also cited, ranges wider in time and space and makes for entertaining as well as instructive reading. "Sin" taxes receive fresh and multifaceted analysis in the new Independent Institute book edited by William F. Shughart II, *Taxing Choice: The Predatory Politics of Fiscal Discrimination* (New Brunswick, N.J.: Transaction Publishers, 1997).

Finally, for readers who may be inclined to tempt fate by asserting a Lockean claim to the fruits of their own labors, a warning: the people who are attempting to tax you are armed and dangerous; proceed at your own risk. Al Capone got away with murder, but they sent him to prison for tax evasion.

ROBERT HIGGS

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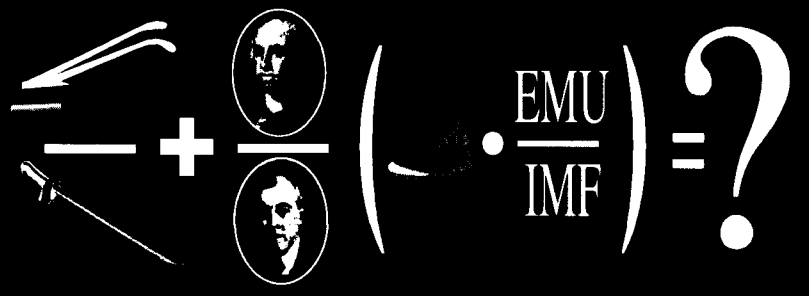

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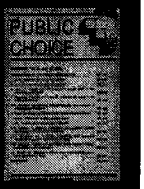

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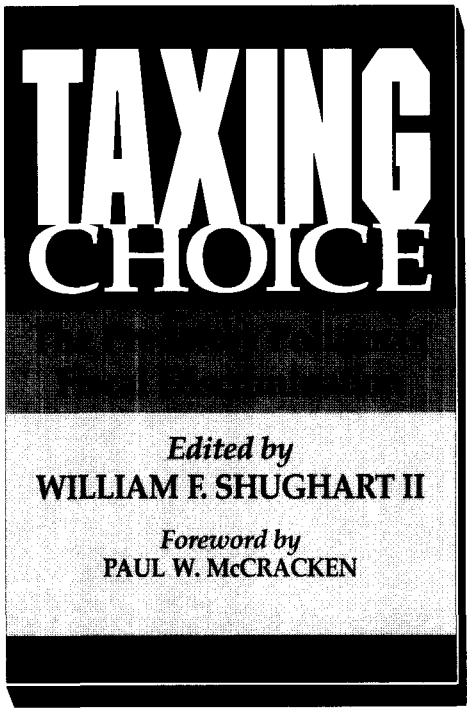

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